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No. 3101

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Appellants,

vs.

TARR & McCOMB, INCORPORATED, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiffs and Appellants:

CATES & ROBINSON, Esquires, Suite 701 Washington Building, Los Angeles, California.

For Defendant and Appellee:

CHARLES C. MONTGOMERY, Esquire, 908 Security Building, Los Angeles, California.

Citation.

By the Honorable Oscar A. Trippet, One of the Judges of the District Court of the United States, for the Southern District of California, in the Ninth Circuit, to Tarr & McComb, Incorporated, a Corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city and county of San Francisco, in the circuit above named, on the 22d day of December, 1917, pursuant to an appeal filed in the clerk's office of the District Court of the United States, for the Southern District of California, wherein Harris and Stevens Corporation, a Corporation, and C. C. Harris, are appellants, and you are appellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand in the city of Los Angeles, in the district and circuit above named, this 24 day of November, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-second.

OSCAR A. TRIPPET,

Judge of the District Court of the United States, for the Southern District of California, in the Ninth Circuit.

[Endorsed]: Original. No. D-32 in Equity. Dept. ..... In the District Court of the United States, in

and for the Southern District of California, Southern Division. Harris and Stevens Corporation, a Corporation, *et al.,* plaintiffs, vs. Tarr & McComb, Incorporated, a corporation, defendant. Citation. Received copy of the within citation this 27th day of November, 1917. Charles C. Montgomery, attorney for defendant. Filed Nov. 27, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Cates & Robinson, suite 701 Washington Building, Los Angeles, Cal., attorneys for plaintiffs.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Plaintiffs,

vs.

TARR & McCOMB, INCORPORATED, a Corporation,

Defendant.

Complaint in Equity.

To the Judges of the District Court of the United States, for the Southern District of California:

Harris and Stevens Corporation, a corporation, and C. C. Harris, each and both citizens and residents of the state of California, within said Southern District of California, and the Southern Division thereof, bring this their bill against Tarr & McComb, Incorporated, a corporation, a citizen and resident of the state of

Arizona, and thereupon your orators complain and say:

I.

That this suit is between citizens of different states:

Your orators are and each of them is a citizen and resident of the state of California, within said Southern District of California, and the Southern Division thereof.

Your orator, Harris and Stevens Corporation, is now, and was at all the times herein stated, a corporation incorporated and existing under and by virtue of the laws of the state of California, and doing business within the said state of California, in said Southern District of California, and the Southern Division thereof.

Your orator C. C. Harris is now, and was at all the times herein stated, the duly elected, qualified and acting president and general manager of your orator Harris and Stevens Corporation, and is now, and was at all the times herein stated, the owner and holder of forty-eight thousand five hundred (48,500) shares of the issued and outstanding capital stock of your orator Harris and Stevens Corporation, and is now, and was at all the times herein stated, the owner and holder of all the issued and outstanding capital stock of your orator Harris and Stevens Corporation, except sixty-five hundred (6500) shares thereof.

The defendant Tarr & McComb, Incorporated, is now, and was at all the times herein stated, a corporation incorporated and existing under and by virtue of the laws of the state of Arizona, and doing business

within the state of California, in said Southern District of California, and the Southern Division thereof.

II.

The amount in controversy herein, to-wit, the value of the leasehold interest in real property in paragraph III hereof hereinafter described, together with the moneys retained and withheld by the defendant as in paragraph XI hereof hereinafter alleged, exceeds the sum of fifty thousand ($50,000.00) dollars, exclusive of interest and costs.

III.

On the 20th day of March, 1917, and for a long time prior thereto, your orator Harris and Stevens Corporation was in the possession of and in the quiet and peaceful enjoyment and use of that certain real property situate within the county of Kern and state of California, in the said Southern District of California, and Northern division thereof, which said real property is particularly described as follows:

The east one-half (E.½) of the northwest one-quarter (N.W.¼) of the northeast one-quarter (N.E.¼) of section 8, township 29 south, range 28 east, Mount Diablo base and meridian, containing 20 acres more or less.

And also the easterly five hundred (500) feet of the north fifteen (15) acres of the west one-half (W.½) of the northeast one-quarter (N.E.¼) of the northeast one-quarter (N.E.¼) of section 8, township 29 south, range 28 east, Mount Diablo base and meridian, under and by virtue of two certain leases executed respectively by E. D. Burge to your orator Harris and Stevens Corporation, and by Volcan Oil and Refining

Company to J. E. Lamb, and by said J. E. Lamb assigned to your orator C. C. Harris, and by said C. C. Harris assigned to your orator Harris and Stevens Corporation, copies of which said leases, and each thereof, together with said assignments thereof, are hereto annexed and marked respectively, Exhibit "A" and Exhibit "B." Under and by the terms of said leases, and each thereof, your orator Harris and Stevens Corporation became entitled to and did operate said above described parcels of real property, and each thereof, for the production of crude petroleum, and your orator Harris and Stevens Corporation did possess and operate said tracts of real property, and both thereof, from the time of taking possession thereof under the said respective leases up to and including the 20th day of March, 1917.

VI.

That on the 24th day of July, 1915, your orator Harris and Stevens Corporation made and entered into a written agreement with said defendant, a copy of which said agreement is hereto annexed and marked Exhibit "C." Under and by the terms of said written agreement, your orator Harris and Stevens Corporation agreed to sell and deliver to said defendant all of the crude petroleum produced from said above described tracts of real property, and both thereof, during the life and existence of said leases thereon hereinabove referred to and described, for the sum of thirty (30c) cents per barrel of forty-two gallons, free on board the cars at Waits Station, in the said county of Kern, state of California, but said defendant did not agree to take and receive said production in the event that said

defendant should be unable to sell said production for thirty (30c) cents per barrel at or upon said property.

V.

That on the 4th day of October, 1916, for the purpose of securing the payment of certain advances and payments of money made and to be made to your orator Harris and Stevens Corporation, by said defendant, your orator Harris and Stevens Corporation assigned said hereinabove described leases, and both thereof, to said defendant, copies of which said assignments, and each thereof, are hereto annexed and marked respectively Exhibit "D" and Exhibit "E."

That thereafter, and early in the year 1917, your orators became and were indebted to sundry individuals, co-partnerships and corporations in a large amount, to-wit, about the sum of forty thousand ($40,000.00) dollars. That all of said indebtedness was then due and payable. That the said creditors of your orators demanded immediate payment of their claims and threatened your orators with suits for the enforcement of the payment of their said claims. Thereafter, and on the 12th day of March, 1917, your orators, as parties of the first part, the defendant, as party of the second part, and the said creditors of your orators, with the exception of three of said creditors hereinafter mentioned, as parties of the third part, made and entered into an agreement, a copy of which is hereto annexed and marked Exhibit "F." Under and by the terms of said agreement, your orator Harris and Stevens Corporation agreed to sell and deliver to the defendant, and the defendant agreed to purchase free on board the cars at Waits Station in the said

county of Kern, state of California, or in a pipe line at or near the point of production, all of the oil produced from the hereinabove described leased premises, and all of the oil at the date of said agreement on hand unmarketed, and all of the oil which should hereafter be produced from the operation of said leased premises during the life of said leases and until all of the claims of said creditors, together with interest thereon at the rate of seven (7%) per cent per annum from the first day of March, 1917, shall have been fully paid, at the same prices paid at the wells by Standard Oil Company to the producer for oil of equal gravity in the same field, less the sum of twenty-two and one-half (22½c) cents per barrel. And said defendant agreed to pay over to The Citizens National Bank of Los Angeles all of said moneys so agreed to be paid by it for the said crude petroleum as aforesaid, which said moneys said agreement provided should be paid by The Citizens National Bank of Los Angeles, in an amount equivalent to thirty (30c) cents per barrel of said oil in payment of rents and royalties accrued upon and pursuant to said leases, and for payment of operating expenses thereof accruing from and after the date of the said agreement, including the payment of a salary to your orator C. C. Harris of two hundred fifty ($250.00) dollars per month, if said thirty (30c) cents per barrel should suffice therefor, after payment of the aforesaid expenses. Under and by the terms of said agreement it is further provided that after said creditors shall have been paid in full, said defendant shall take and receive as soon thereafter as convenient from said properties, twenty-eight thousand

(28,000) barrels of oil for which said defendant shall pay your orators the sum of thirty (30c) cents per barrel, and that thereafter during the life of said leases, said defendant shall market said oil for not less than said Standard Oil Company's aforesaid price, and from the proceeds thereof shall pay to your orators thirty (30c) cents per barrel, shall retain for itself twenty (20c) cents per barrel, and the balance of said price shall be equally divided between your orators and said defendant. Under and by the terms of said agreement it is further provided that all accounts receivable of your orators, at the date thereof, shall be assigned to the said The Citizens National Bank of Los Angeles, or its nominee, and all moneys paid thereon shall be disbursed by the said bank to said creditors, *pro rata,* according to the amounts of their respective claims; that oil well casing in and upon said property is of the approximate value of three thousand ($3,000.00) dollars, and that the same shall be sold under the direction of said bank and the proceeds of such sale shall also be disbursed by said bank to said creditors, *pro rata,* according to their respective claims. Under and by the terms of said agreement it is further provided that in the event said defendant shall make default in receiving and paying monthly for said oil produced from said leased premises, the said The Citizens National Bank of Los Angeles, on behalf of your orators and of said creditors, shall have and take such recourse against said defendant for such default as might otherwise be had and taken by your orators, if said agreement had been made and entered into between your orators and said defendant only; provided

always that in having and taking such recourse, said bank shall act upon the direction of a majority amount of said creditors, and shall apply all of the proceeds or sums of money accruing from any such recourse to and amongst the said creditors *pro rata,* according to their respective claims, including said interest. Under and by the terms of said agreement it is further provided that the defendant would and did hold the assignments of said leases, and of each thereof, executed by your orator Harris and Stevens Corporation, on October 4, 1916, for the benefit of all of the creditors, parties to said agreement, and that, upon the payment of the claims of all of said creditors, the said assignments should be and become of no further effect and cancelled.

Under and by the terms of said agreement it is further provided that in consideration of the premises all of said creditors agree to extend the time of payment of their respective claims against your orators to and including the first day of September, 1917, and promise and agree, during said period, to have or take no recourse for enforcement or security of their said claims, except pursuant to and according to the provisions of said agreement, and said creditors further agree that, if on or before the first day of September, 1917, there shall have been paid to and received by them upon their said claims pursuant to said agreement, the sum of not less than six thousand dollars ($6,000.00) dollars, exclusive of any sum or sums of money paid to or received by them from the proceeds of the sales of oil well casing, as in said agreement provided, or from the proceeds of said accounts re-

ceivable as aforesaid, then, and in that event, the said creditors agree that the maturity of their said claims shall be postponed for a further period of six (6) months, and if during said last mentioned extension of time of payment the amount paid to and received by said creditors to and upon their said claims shall be equal to six thousand ($6,000.00) dollars, the maturity of their said claims shall be again postponed for a third period of six (6) months, and in like manner it is agreed that the maturity of said claims of said creditors shall be successively postponed by periods of six (6) months whenever and as long as the amount paid to said creditors during the preceding six (6) months shall be not less than the sum of six thousand ($6,000.00) dollars.

VII.

That thereafter, and on or about the 21st day of March, 1917, three of the creditors of your orators having claims against your orators aggregating about the sum of three thousand ($3,000.00) dollars, refused to sign and become parties to said agreement of March 12, 1917, and said creditors so refusing to sign and become parties to said agreement as aforesaid threatened that they would commence suits and actions against your orators for the recovery of their several claims, and would cause writs of attachment to be issued and levied against the hereinabove described tracts of real property, and both thereof, and the interests of your orators and the defendant therein. That thereupon, for the purpose of protecting the interests of your orators and of the said creditors of your orators who had theretofore signed and become

parties to said agreement of March 12, 1917, your orators surrendered to said defendant the possession of said above described tracts of real property, and both thereof, together with all the personal property situate thereon and appurtenant thereto, and the said defendant represented to and agreed with your orators that it would take and receive possession of the said real and personal property and hold and operate the same for the benefit of your orators and the said creditors of your orators who had signed and had become parties to said agreement of date March 12, 1917, Exhibit "F" hereto. That said representation so made as aforesaid by said defendant was false, and said defendant, at the time it made said representation, knew the same to be false, and your orators allege on information and belief that said defendant made the said promises, and each of them, without any intention on its part of performing the same, and then and there intended to keep the property so surrendered to it for its own use and not for the benefit of your orators and the said creditors of your orators who had signed and had become parties to said agreement of date of March 12, 1917, and that it made said promises and accepted said possession with the intention of defrauding your orators.

VIII.

That notwithstanding all the facts hereinabove alleged, said defendant has, from time to time, rendered to the said The Citizens National Bank of Los Angeles, statements showing receipts and expenditures from the operation of said properties, and has paid to said The Citizens National Bank of Los Angeles, for the benefit

of all the said creditors of your orators, certain sums of money to be by said bank disbursed to said creditors in partial payment of their respective claims, and the said The Citizens National Bank of Los Angeles has paid said sums of money so received by it from the defendant as aforesaid to the said creditors, who have received and receipted for the same.

IX.

That shortly after the 21st day of March, 1917, the three creditors hereinabove mentioned who had theretofore refused to sign said agreement of March 12, 1917, as hereinbefore alleged, signed and became parties to the same, as of date of said March 12, 1917. That at the time your orator Harris and Stevens Corporation, and your orator C. C. Harris, as president thereof, surrendered said property as aforesaid, your orator Harris and Stevens Corporation was not possessed of any other property, and all of the property of your orator C. C. Harris, other than his interest in the real property hereinabove described, was heavily encumbered, and your orators were without any money or property whatsoever, otherwise than in this paragraph alleged.

X.

That at the time of said surrender of the possession of said property your orators had performed and carried out all of their obligations and agreements with said defendant and with the lessors in said leases named and had not failed to perform or carry out each and every of their obligations and agreements with said defendant and with said lessors, and with each and all of them, and no consideration whatever

was paid to your orators, or to either of them, by said defendant for the surrender of the possession of said property.

XI.

Your orators have repeatedly requested and demanded of the defendant that it render to them a just and true account of the expenses of operation of said property and leased premises, but said defendant has refused and still refuses to render such or any account thereof.

The defendant has retained and still retains and withholds from the said The Citizens National Bank of Los Angeles, without right or authority, large sums of money which it has received as income from the sale of oil produced from said property. That the said The Citizens National Bank of Los Angeles has repeatedly requested and demanded of the defendant that it render to it, the said bank, an account of the moneys in its hands and that it pay over the same to the said bank for the benefit of said creditors of your orators, but said defendant has refused and still refuses to render such account or to pay over said moneys, except certain sums of money which it has paid to said bank, from time to time, in amounts fixed and determined by it, the said defendant, arbitrarily; but your orators allege, on information and belief, that the sums and amounts of money heretofore paid by said defendant to the said The Citizens National Bank of Los Angeles do not constitute the full amount agreed to be paid by said defendant to the said bank for the use and benefit of the said creditors of your orators under and

by the terms of said agreement of date of March 12, 1917, Exhibit "F" hereto.

XII.

That thereafter, and on or about the 29th day of June, 1917, your orators demanded the surrender to your orator Harris and Stevens Corporation of the possession of said premises, together with all personal property of every kind and character appurtenant to and used upon said parcels of real property, and both thereof, and demanded that defendant allow said property to be operated in accordance with the stipulations, agreements and conditions contained in said agreement of March 12, 1917, between your orators, parties of the first part, the defendant, party of the second part, and the creditors of your orators, parties of the third part, but said defendant refused and still refuses to surrender possession of said premises and refused and still refuses to allow said herein described property to be operated in accordance with the stipulations, agreements and conditions contained in said agreement of March 12, 1917, herein fully set forth.

XIII.

The reason the said creditors of your orators are not made parties to this complaint is that said creditors are for the most part citizens and residents of the said state of California, and therefore cannot be made parties hereto without ousting the jurisdiction of this court.

Forasmuch, therefore, as your orators are without adequate legal remedy in the premises as and by the strict rules of common law and can only obtain relief in this court of equity, wherein matters of this nature

are property cognizable and relievable, your orators most respectfully pray:

1. That the title of your orator Harris and Stevens Corporation, as lessee herein described, and its ownership of the leasehold in and to said property and right to and immediate possession thereof as against this defendant, be affirmed and established.

2. That it be adjudged and decreed that the said real and personal property were received by the said defendant Tarr & McComb, Incorporated, and that the said property and the proceeds thereof have been and are held by defendant Tarr & McComb, Incorporated, in trust for your orators, and that said trust be adjudged to be terminated, and that the defendant be ordered to deliver said property to your orators forthwith.

3. That the defendant Tarr & McComb, Incorporated, be directed to account for the said property and all rents, income or profits which may have been derived from said property, and that the defendant be directed to return the same to your orators, and to execute all conveyances and documents necessary and proper to carry the decree of this Honorable Court into effect.

4. That the defendant Tarr & McComb, Incorporated, be hereafter forever enjoined from asserting any claim, right, title or interest in or to the aforesaid property, or any part thereof.

5. That the court shall direct such other and further relief as may seem just and equitable.

6. May it please the court to grant to the plaintiffs a writ of subpoena directed to said defendant Tarr &

McComb, Incorporated, commanding it to appear and answer this bill of complaint (but not under oath, answer under oath being expressly waived), and to abide by and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

Dated July 16, 1917.

CATES & ROBINSON,
ALTON M. CATES,
Counsel,
Suite 701 Washington Building, No. 411½ South Spring Street, Los Angeles, California.

EXHIBIT "A."

LEASE.

This indenture, made this 6th day of May, 1915, by and between E. D. Burge of Orange county, state of California, hereinafter called the lessor, and Harris & Stevens Corporation, a corporation organized and existing under the laws of the state of California, having its principal place of business at the city of Los Angeles in said state, hereinafter called the lessee, witnesseth:

In consideration of the mutual agreements and covenants herein set forth, and the rental or royalty to be paid as hereinafter stated, said lessor does hereby lease upon said lessee, and said lessee does hereby take from said lessor upon the terms and conditions hereinafter set forth for a period of forty months, beginning the 1st day of January, 1915, and ending the 30th day of April, 1918 (with privilege of renewal of said lease upon the conditions hereinafter set forth), the following described real property situate in the county

of Kern, state of California, to-wit : The east half of the northwest quarter of the northeast quarter of section eight (8), township twenty-nine (29) south range twenty-eight (28) east, Mount Diablo base & meridian, containing twenty (20) acres, more or less, together with the rigs, materials, engines, boilers, machinery, tools, equipment and personal property thereon situate, for the purpose of operating said property for the production and sale of oil and gas.

As one of the considerations for the execution and delivery of this lease the lessee hereby agrees to pay to the National Bank of Bakersfield, at Bakersfield, California, for the lessor, the sum of twenty (20) cents per net barrel of forty-two gallons each upon all oil produced by said lessee upon said leased premises. All oil sold and delivered during any calendar month shall be paid for on or before the 25th day of the succeeding month. Payment to said National Bank of Bakersfield for the lessor shall be deemed to be payment to the lessor, and said bank is authorized to receive such payments hereunder according to the terms of this lease. Lessee shall have the right and privilege, without charge, to use whatever oil or gas is necessary for fuel in the operation of said leased premises.

The lessee hereby covenants and agrees to pump all the wells now on said leased premises continuously, to keep them in first-class condition, and to use every effort to make said wells produce their full capacity at all times.

Lessee shall have the right to use all tools, drilling machinery, materials and equipment now located on said leased premises during the term of this lease,

or any extension thereof, and agrees to keep the same in good condition and repair, and to return the same in good condition and repair to the lessor at the termination of this lease, or any extension thereof, ordinary wear and tear excepted. An inventory is to be made of said tools, drilling machinery, materials and equipment, by a representative of each of the parties hereto and shall be considered a part of this lease and attached hereto.

Lessee agrees to keep a true and accurate account of all oil produced by it upon said leased premises, and such book or books of account shall be open at any and all times for inspection by the lessor or his accredited agent. All labor and material necessary for operating said lease shall be purchased in the name of the lessee and paid for by it.

The lessee hereby covenants and agrees that it will not suffer any liens or attachments to be filed against said leased premises on account of labor, material or accident, and in case any such lien or attachment should be filed, lessee will defend same at its own cost and expense and pay and discharge any judgment or judgments that may be rendered on account thereof, and will carry insurance in a responsible company to protect against injury to any person employed upon said property; and lessor agrees that he will protect the lessee against any interference with its working and operating said premises by reason of any lien or attachment suffered by the lessor.

The lessor shall have the right and privilege of drilling any new wells on said property at any time during the term of this lease, or any extension thereof,

and in so doing to use the tools and machinery upon said property, provided the same be done in a reasonable manner and so as not to unreasonably or unnecessarily interfere with the operations of the lessee hereunder and provided that upon the completion of any new well the lessor shall give notice thereof to the lessee in writing and the lessee shall then have the right and option to take said well and pump same and to dispose of the oil and gas produced therefrom in the same manner and upon the same terms and conditions as herein set forth governing its operation and pumping of the wells now on said property, provided that the lessee shall exercise its right and option to so take said new well within thirty days after receiving such written notice from lessor, and shall, within said time, give lessor written notice of its said election, and in the event of lessee's failure to exercise its said option and give said notice within said time, then it shall thereafter have no right to take or operate said new well or have any interest in the product thereof, but said well may thereafter be pumped and operated and the product thereof sold or otherwise disposed of by the lessor. However, the failure of lessee to exercise its option as to any new well or wells so drilled by lessor shall not be construed as a waiver of its right to exercise its said option as to any other well or wells which may thereafter be drilled on said property by the lessor.

It is understood and agreed that the lessee shall use a gas engine or engines for the operation of said property.

It is understood and agreed that the rent or royalty

of twenty cents per barrel herein provided to be paid the lessor by the lessee shall also apply to and be paid from sales of all oil now in storage in sumps or tanks on the said leased premises.

The lessor has this day placed in escrow with the National Bank of Bakersfield aforesaid, a grant, bargain, and sale deed executed by himself and M. M. Burge, his wife, conveying to F. F. Richards, as trustee for Ohio Crude Oil Company, a corporation, the hereinbefore described leased premises with the appurtenances, and materials, and equipment thereon situated, together with escrow instructions providing that in case there shall be received by said bank for the lessor on or before the 30th day of April, 1918, the sum of $26430.40, together with interest thereon at the rate of 12% per annum from the date hereof, either from rent or royalties paid to said bank by the lessee herein, or moneys paid to said bank for the lessor by the grantee in said deed above-mentioned, or both, then that said bank shall deliver to said F. F. Richards, as trustee above-named, the said deed, and also providing that in case said sum of $26430.40, together with interest as aforesaid, be not so received by said bank for the lessor on or before the said 30th day of April, 1918, then that said deed be returned to the lessor and that said escrow shall cease. And it is hereby understood and agreed that this lease is made for a period of time concurrent with the period of said escrow, and is subject to the right given in said escrow to said F. F. Richards, as trustee above-named, to have said deed delivered to him upon compliance with the terms of said escrow above-mentioned. And

in case the said F. F. Richards, as trustee as aforesaid, the grantee in said deed above-named, shall fail to comply with the terms of said escrow and receive said deed within the period in said escrow provided, and said escrow shall thereby be terminated, then the lessee shall have and is hereby given an extension of the term of this lease to and including the 31st day of December, 1923, upon the payment of like rental and royalty and performance of the covenants and conditions hereinbefore set forth.

The lessee hereby agrees that if, on or before the 1st day of January, 1916, there shall be furnished by or through the lessor, and delivered on the premises demised, 1500 feet of 40 lb. 10 inch pipe for use in redrilling wells Nos. 6 and 7 on said demised premises, it will, at its own expense immediately proceed with the redrilling of said wells, and each of them, and will prosecute said work continuously and diligently in a good and workmanlike manner to completion. Lessee agrees that it will, at its own cost and expense, redrill well No. 1 on said demised premises, and furnish all labor, pipe and materials therefor, and that it will begin said work of redrilling said well No. 1 not later than the 1st day of April, 1916, and will prosecute said work continuously and diligently in a good and workmanlike manner and make reasonable effort to make the same a producing well.

If the lessee fails to carry out any of the obligations or requirements of this lease or any extension thereof as herein specified said lessee shall immediately forfeit all rights secured to it herein, and this lease or extension thereof shall terminate without notice, and in

such case lessee agrees that it will quit said premises and give lessor peaceful possession of the property covered by this lease or any extension thereof, and in such case it is agreed that lessor shall have the right to enter upon and take possession of said premises without necessity of suit or action, and remove all persons therefrom.

Lessee shall not assign this lease, or any interest therein, or sublet said leased premises, or any portion thereof or any interest therein, without the consent of the lessor in writing first obtained, and any attempted assignment or subletting shall *ipso facto* work a forfeiture of this lease or any extension thereof.

This agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

In witness whereof, the said lessor has hereunto set his hand and seal and the said lessee has caused these presents to be executed by its president thereunto first duly authorized, in its corporate name and under its corporate seal, the day and year first hereinabove written.

E. D. BURGE. (Seal.)
HARRIS & STEVENS CORPORATION,
By C. C. Harris,
Its President.

State of California, County of Kern—ss.

On this 7th day of June in the year one thousand nine hundred and fifteen A. D., before me, W. W. Laidley, a notary public in and for said county and state, residing therein, duly commissioned and sworn,

personally appeared E. D. Burge, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) W. W. LAIDLEY,

Notary Public in and for Kern County, State of California.

EXHIBIT "B."

San Diego, Cal., April 18th, 1914.

The following resolution was offered:

Resolved that the matter of consent to the assignment of lease on the Volcan Oil & Refiining Co., from C. C. Harris to Harris & Stevens Corporation, be left entirely to the judgment of C. H. Wagner, and he is hereby authorized to act upon same without further call.

On motion of Director B. J. Edmonds, seconded by Director Jas G. Fleming, and carries unanimously the foregoing resolution was adopted.

G. F. NOLAN, Secy.

VOLCAN OIL & REFINING CO.

San Diego, Cal., Dec. 16th, 1913'.

Mr. J. E. Lamb, Bakersfield,

Mr. C. C. Harris, Los Angeles, Cal.,

Gentlemen:

Beg to advise that the Volcan Oil & Refining Co. consents to sale of lease between J. E. Lamb and the Volcan Oil & Refining Co. dated Sept. 20th, 1913, to

C. C. Harris of Los Angeles, provided C. C. Harris agrees to fulfill all obligations as agreed upon in said lease.

Mr. Harris agreed that he will not release nor sell his interest in this lease without the written consent for the lessor.

The clause requiring the redrilling of well #1 by January 1st, 1914, is changed to read as follows: The lessee agrees to redrill well #1 and finish this work complete by February 1st, 1914, etc.

Inventory. C. C. Harris to become responsible for all tools and supplies belonging to the Volcan Oil & Refining Co., as per inventory to be taken by J. E. Lamb and C. C. Harris, within 10 days from the date of this letter.

Loading rack. Revenue from the loading rack from other sources than C. C. Harris, is the property of the Volcan Oil & Refining Co. C. C. Harris will collect same and remit it to the Volcan Oil & Refining Co. by the 10th of each month.

Under a certain agreement dated Dec. 13th, 1913, between J. E. Lamb and C. C. Harris there is due and payable to J. E. Lamb the amount of $700.00 in monthly payments of $50.00. It is mutually agreed by C. C. Harris to pay $25.00 of this installment to J. E. Lamb and the other half of $25.00 to the Volcan Oil & Refining Co. until the full amount of $700.00 has been paid up.

Yours very truly,

(Corp. Seal) C. H. WAGNER, President.
G. F. NOLAN, Secretary.

Accepted Dec. 17th, 1913.
C. C. HARRIS.
J. E. LAMB.

This indenture, made this 20th day of September, 1913, between the Volcan Oil & Refining Co., a corporation organized and existing under the laws of the state of Arizona, lessor, and J. E. Lamb of Bakersfield, Kern county, California, lessee, witnesseth:

That the said lessor has by these presents leased unto the said lessee upon the following terms and conditions that certain personal property, located on the easterly 500 ft. of the north fifteen acres of the west half of the northeast quarter of the northeast quarter, of section eight, township 29 S., R. 28 east M. D. B. & M.

This personal property consists of seven oil wells, one water well, warehouse, cottage, bunkhouse, toolhouse, water tank, boilers, pipe lines to the Warren Refinery, pipe line to Judkins Refinery and loading rack, and loading rack on S. P. Railway right-of-way, tools and supplies, as per inventory attached to this instrument.

In consideration for this lease the lessee agrees to deliver to the lessor one-sixth of all the oil produced from said land until January 1st, 1914, and one-fourth of all oil produced from said land between January 1st, 1914, and September 20th, 1918, excepting the amount consumed in operation of the wells and the cleaning of the oil. Said delivery of oil shall be made at such times and in such quantities as the lessor may desire. The lessee shall provide storage for the oil belonging to the lessor. The oil shall be delivered to the lessor in the customary good market condition, either f.o.b. cars at the railway switch belonging to the lessor or at the terminal ends of the pipe lines connected with tanks of the lessor; or if the lessor shall

so elect said lessee shall pay to said lessor its proportion of the proceeds of the sale of oil produced and sold from said land. Such payment to be made in cash on or before the 25th day of each month for all oil sold the previous month.

In further consideration for the lease, the lessee agrees to redrill well #1 and finish this work complete before January 1st, 1914, and drill well #4 during the year 1914, finishing each well with not less than 8" casing and to a depth of not exceeding 1,000 ft, and paying for all labor and material necessary to complete these wells. It is understood that lessee can use for this work all material and tools on ground belonging to lessor.

Lessee agrees that he will keep all property leased to him in good condition during the life of this lease and return same to the lessor at the expiration of the lease in good condition, natural wear excepted. Lessee agrees to pay for all labor and material used in operation and maintenance during the life of this lease and agrees that he will give all this work personal attention and supervision. Lessee agrees that he will not release nor sell his interest in this lease without the written consent of the lessor.

This lease is to expire September 20th, 1918, the lessee to have the right of renewal for five years, at the said terms.

The lessee agrees to keep true and accurate accounts showing the production of the wells operated under this lease and the sales and deliveries of oil therefrom, which accounts shall be open at all times to the inspection of the lessor or its agents, and said lessee shall

furnish to said lessor at its office, corner 1st & I Sts., San Diego, Cal., on every Saturday, a complete statement of the production of the wells during the previous week, estimated barrels of oil on hand, deliveries of oil and to whom, the terms and price.

The lessee shall permit the lessor or its agents free access to the property leased for the purpose of examining the condition of the wells and other property and investigating the faithful performance of the contract by the lessee.

The lessee agrees to operate the oil wells continuously during the life of this lease, excepting when price of oil at Bakersfield should fall below 30c per barrel, when lessee may discontinue the operating until the price of oil is again at 30c per barrel.

All taxes on the land and on the improvements are to be paid by the lessor.

Water well. The water well is to be pumped by the lessee as he elects. Should water be sold to outside parties, one-quarter of the receipts of such sales is to be paid to the lessor.

All tools and supplies belonging to the lessor shall be turned over and invoiced to the lessee at a valuation agreed upon by lessee and lessor and shall be returned to the lessor at the expiration of the lease in good order, natural wear and tear excepted, otherwise shall be paid for by the lessee at the expiration of the lease.

All labor and material necessary for the operation of the property shall be purchased in the name of lessee and paid for by him. The property of the Volcan Oil & Refining Co. is to be posted by lessor with notices

stating that the Volcan Oil & Refining Co., or its property is not to be held liable for claims of any nature. The lease shall not suffer any lien to be filed against the lessor's property on account of labor, material or accidents and in case any lien should be filed he shall defend same wholly at his own cost and expense and pay any judgment that may be rendered on account thereof. In case said lessee refuses or neglects to defend any action to enforce lien or liens as aforesaid, then said lessor may defend same and pay any judgment rendered thereon and the said lessee agrees to pay to said lessor any and all expenses incurred by said lessor in such defense, payment of judgment and attorney fees.

Should the lessee fail to carry out any of these obligations herein specified, neglect to drill wells as specified, keep the wells in good pumping order, refuse or neglect to pump any of the wells on said land, or should violate any of the covenants, conditions or obligations hereof, the lessee shall immediately forfeit all rights secured to him hereby and this agreement shall terminate without notice, and in such case the lessee shall quit said premises and give the lessor peaceful possession of the property covering by this lease and any perdonal property which may have added to it during the life of this lease.

In case of sale of the property, this lease shall be considered as cancelled and the lessee shall be paid by the lessor such amounts as he has expended for redrilling well #1 and drilling well #4 for material and labor. The lessee shall file with the lessor his itemized bill of expense, duly sworn to, as soon as either well

mentioned has been finished and the amount actually paid out by him shall be all that he is entitled to in case of a sale.

It is hereby understood and agreed that this agreement shall be binding upon said lessor and said lessee and their respective heirs, executors, administrators, successors and assigns.

In witness whereof, the said lessor, by its president and secretary has herewith set its hand and seal the day and year above written.

(Corp. Seal) C. H. WAGNER, President.
G. F. NOLAN, Secretary.

J. E. LAMB, Lessee.

The undersigned Volcan Oil and Refining Company, a corporation duly organized and existing under and by virtue of the laws of the state of Arizona, does hereby consent that the certain indenture of lease executed by said corporation on the 20th day of September, 1913, to J. E. Lamb and thereafter assigned by said J. E. Lamb to C. C. Harris, which said assignment has heretofore been assented to, ratified and confirmed by the undersigned, may be assigned and transferred by said C. C. Harris to Harris and Stevens Corporation, a corporation duly organized and existing under and by virtue of the laws of the state of California, and having its office and principal place of business at #515 Bernardo street, in the city of Los Angeles, county of Los Angeles, state of California.

In witness whereof, said Volcan Oil and Refining Company has caused these presents to be executed by its president and secretary thereunto duly authorized

and its corporate seal to be hereunto affixed this 28th day of April, 1914.

Executed in duplicate.

VOLCAN OIL AND REFINING COMPANY,
By C. H. Wagner, President.
By G. F. Nolan, Secretary.

(Corp. Seal)

State of California, County of San Diego—ss.

On this 28 day of April in the year of our Lord one thousand nine hundred and fourteen before me, Oliver L. Sellers, a notary public in and for said county of San Diego, state of California, residing therein, duly commissioned and sworn, personally appeared C. H. Wagner, known to me to be the president, and G. F. Nolan, known to me to be the secretary of Volcan Oil and Refining Company, the corporation that executed the within and foregoing instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) OLIVER L. SELLERS,
Notary Public in and for the County of San Diego, State of California.

I, C. C. Harris, for a valuable consideration do hereby sell, assign, transfer and set over all of my right, title and interest in and to the within and foregoing described lease unto Harris and Stevens Corporation, a corporation duly organized and existing under and by virtue of the laws of the state of California,

subject to all of the covenants and agreements on behalf of the lessee therein contained.

Dated at Los Angeles, California, this 30th day of June, 1914.

Executed in duplicate.

C. C. HARRIS.

State of California, County of Los Angeles—ss.

On this 30th day of June in the year of our Lord one thousand nine hundred fourteen before me, Hazel D. Crabb, a notary public in and for said county of Los Angeles, state of California, residing therein, duly commissioned and sworn, personally appeared C. C. Harris, known to me to be the person whose name is subscribed to the within and annexed instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

(Seal) HAZEL D. CRABB,

Notary Public in and for the County of Los Angeles, State of California.

Harris and Stevens Corporation, a corporation duly organized and existing under and by virtue of the laws of the state of California, does hereby accept the assignment of the within and foregoing described lease, and hereby agrees to abide by and carry out all of the terms and conditions of said lease therein contained.

In witness whereof, said Harris and Stevens Corporation has caused these presents to be executed by its president and secretary thereunto duly authorized and

its corporate seal to be hereunto affixed this 30th day of June, 1914.

Executed in duplicate.

HARRIS AND STEVENS CORPORATION,
By C. C. Harris, President.
By L. L. Stevens, Secretary.
(Corp. Seal)

State of California, County of Los Angeles—ss.

On this 30th day of June, in the year of our Lord one thousand nine hundred fourteen, before me, Hazel D. Crabb, a notary public in and for said county of Los Angeles, state of California, residing therein, duly commissioned and sworn, personally appeared C. C. Harris, known to me to be the president, and L. L. Stevens, known to me to be the secretary, of Harris and Stevens Corporation, the corporation that executed the within and foregoing instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) HAZEL D. CRABB,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT "C."

This contract and agreement, made in duplicate this 24th day of July, 1915, by and between Harris & Stevens Corporation, a corporation organized and existing under the laws of the state of California, having

its principal place of business at the city of Los Angeles in said state, party of the first part, and Tarr & McComb, Incorporated, a corporation organized and existing under the laws of the territory of Arizona, whose principal place of business is in Kingman, Mohave county, Arizona, and with an office in Los Angeles, California, party of the second part.

Witnesseth: That for and in consideration of the covenants and conditions herein contained and subject to the terms and restrictions hereinafter set out, party of the first part agrees to sell and deliver on board the cars at Waits Station, Kern county, California, and second party agrees to buy at the prices and terms hereinafter specified the entire output of crude oil from the following described properties.

The properties covered by this contract are those now under lease to the first party as follows:

The properties covered by a lease made May 6, 1913, for a period of 40 months with privilege of renewal upon certain conditions, by E. D. Burge to Harris & Stevens Corporation, to-wit:

E.½ N.W.¼ N.E.¼, section 8, township 29 south, range 28 east, Mount Diablo B. & M., Kern county, California, containing 20 acres, more or less.

The properties covered by the foregoing Burge lease are also under agreement by F. F. Richards, trustee for Ohio Crude Oil Co., with Harris & Stevens Corporation, to lease to said Harris & Stevens Corporation on the same terms as in the Burge lease contained, if said trustee should be able to redeem said properties.

The properties covered by a lease made September 20, 1913, for a period of five years, and right of renewal

for five years, by Volcan Oil & Refining Co. to J. E. Lamb, and with the consent of said Volcan Oil & Refining Co. assigned by said J. E. Lamb to C. C. Harris, and by said C. C. Harris to Harris & Stevens Corporation, to-wit:

The easterly 500 feet of the north 15 acres of the W.½ N.E.¼ N.E.¼, section 8, township 29 south, range 28 east, Mount Diablo B. & M., Kern county, California.

Properties covered by a lease made June 30, 1914, for a period of one year with privilege of renewal for 3 months, by Harry Gray to Harris & Stevens Corporation, to-wit:

S.½ W.½ E.½ N.E.¼ N.E.¼ and S.2-½ across E.½ W.¼ N.E.¼ N.E.¼.

All in section 8, township 29 south, range 28 east, Mount Diablo B. & M., Kern county, California.

Properties covered by a lease made October 5, 1914, for a period of one year, subject to termination on 30 days' notice in writing, by Spencer V. Cortelyou to C. C. Harris, to-wit:

N.½ W.½ E.½ N.E.¼ N.E.¼ of section 8, township 29 south, range 28 east, mount Diablo B. & M., in Kern county, Cal.

Renewals or new leases on the properties held under short time leases or any arrangements whereby party of the first part directly or indirectly has control of any of the properties above described during the life of this contract shall inure to the benefit of the second party under the terms of this contract, the intention being that this contract shall cover the properties above described for all or such portion or portions of

time that first party may control same during the life of this contract.

Wells covered by this contract are those now existing or which may hereafter be established during the life of this contract on the properties covered thereby.

The term of this contract shall be three years from the date hereof with an option to the second party to extend same for a period of two years on giving written notice thereof on or before 60 days prior to the expiration of the first three years.

The quantity of oil which the second party is entitled to receive hereunder is the entire output of the above described properties. Said is estimated by the first party to be now approximately 6,000 barrels per month.

Accumulation of oil on the properties of the first party to an excess of 20,000 barrels, shall entitle said first party to sell such excess and account to said second party for 50% of the proceeds of such sale or sales above 30c per barrel, provided, however, that before making any sale or sales under this provision, first party shall give to second party an opportunity to sell within fifteen days of notice from first party the oil to the purchaser or purchasers produced by said first party, or to others, as second party may elect. In the event the second party elects to sell to the purchaser or purchasers produced by first party when there is an accumulation of oil as aforesaid, said second party shall pay, as hereinafter provided, 30c per barrel for such oil and in addition 50% of the amount of such sale or sales above 30c per barrel on the excess accumulated above 20,000 barrels.

Measurement of said oil shall be according to the official capacity of the cars used as shown by the capacity sheets of the railroad or company whose cars are used, and shall be adjusted to temperature at 60 degrees Fahrenheit.

Delivery, loading and shipping of oil shall be as nearly as possible in accordance with the requests of the second party.

Quality of oil shall be clean to within 2% moisture and base substance combined, and in no event is oil to be loaded containing in excess thereof. Deductions shall be made to clean oil.

Gravity of said oil is approximately 12 degrees Baume. In the event that it shall become necessary to ship a lighter gravity in order to sell said oil, second party may mix same with a lighter oil to be furnished by them. In such event first party shall do the mixing, including loading, unloading, pumping and such other things as may be necessary to reship same without expense to second party.

The price of oil covered by this agreement shall be 30c per barrel of 42 gallons f.o.b. cars at Waits Station, Kern county, California, except in case it shall become necessary for second party to sell the oil to be purchased of the first party at less than 30c per barrel in order to move said oil and prevent an accumulation thereof on the properties of the party of the first part. In such a case the second party, with the consent in writing of the first party, may sell said oil at less than 30c per barrel and account for such oil at the price or prices for which same is so sold.

When second party shall be unable to dispose of said

oil at 30c or more per barrel f.o.b. cars at Waits Station, Kern county, California, to good and responsible parties for payment within 30 days after delivery, said second party is released from all obligations in law and equity to receive or dispose of said oil except as above provided under the heading "Accumulation of Oil."

Payments for all oil delivered under this contract shall be made at Los Angeles, California, on or before the 20th day of each calendar month for all oil shipped during the preceding calendar month.

No liability shall attach to either party for any delays or damages occasion by, or arising from strikes, or other labor disturbances, earthquakes, fires, action of the elements, war insurrection, riot or rebellion or interference by civil or military authorities, or any other cause beyond the control of the defaulting party.

Assigns and successors of both parties are equally bound by and entitled to the benefits of this contract.

In witness whereof, the respective parties have caused these presents to be executed, attested, and their corporate seals to be hereunto affixed by their respective officers hereunto duly authorized.

HARRIS & STEVENS CORPORATION,
By C. C. Harris, President.
And By....., Secretary.
(Corporate Seal)

TARR & McCOMB, INC.,
By Harry McComb, President.
And By N. W. Tarr, Secretary.
(Corporate Seal)

EXHIBIT "D."

Assignment of Lease.

Harris & Stevens Corporation, a corporation organized and existing under the laws of the state of California, having its principal place of business in the city of Los Angeles, in said state, in consideration of such indebtedness as now exists or may hereafter be contracted by it to Tarr & McComb, Incorporated, a corporation organized and existing under the laws of the territory of Arizona, whose principal place of business is in Kingman, Mohave county, Arizona, and with an office in Los Angeles, California, does hereby sell, assign and transfer to said Tarr and McComb, Incorporated, and set over all of its right, title and interest in and to the indenture and lease dated the 6th day of May, 1915, which lease was recorded June 10, 1915, in book 27 of leases, page 367, Kern county records, from E. D. Burge to Harris & Stevens Corporation.

This assignment is for the purpose of securing said Tarr & McComb, Incorporated, for all moneys now due from said Harris & Stevens Corporation to Tarr & McComb, Incorporated, or that may be hereafter advanced by said Tarr & McComb, Incorporated, to said Harris & Stevens Corporation or on their behalf, and further to secure any obligations or indebtedness that may hereafter be incurred or accrue on account of said Harris & Stevens Corporation to said Tarr & McComb, Incorporated.

This assignment is subject to all covenants and agreements on behalf of the lessee contained in the said

lease hereby assigned. In consideration of the premises and particularly of moneys to be hereafter advanced by said Tarr & McComb, Incorporated, to Harris & Stevens Corporation, the said Harris & Stevens Corporation agree to continue operations under said lease according to the terms and conditions thereof, and agree further as follows:

Said Harris & Stevens Corporation, in the event of any breach of condition of said lease whereby there may be a default therein, or upon failure to operate under said lease effectively, or upon default in any of its indebtedness, or obligations now or hereafter accruing or incurred by or on behalf of said company to Tarr & McComb, Incorporated, will upon demand in writing surrender the possession of the premises to Tarr & McComb, Incorporated, and this agreement shall become fully effective to transfer all the rights, title and interest of said Harris & Stevens Corporation to Tarr & McComb, Incorporated.

Failure for six months to operate at an average production of two thousand (2000) barrels per month, or failure in any one month to produce at least fifteen hundred (1500) barrels, shall be deemed to be failure to operate under this lease effectively.

Harris & Stevens Corporation, when Tarr & McComb, Incorporated become, as aforesaid, entitled to possession of the properties under the lease will quit said premises and give Tarr & McComb, Incorporated, peaceful possession of all the property covered by said lease, and all materials, tools and appliances used in the operation of said properties, whether owned by lessor or by Harris & Stevens Corporation and said

Tarr & McComb, Incorporated, shall have the right to enter upon and take possession of said premises and personal property without necessity of suit or action, and remove all persons therefrom, but without waiver of right to such action legal or equitable as it may be entitled to, it being conceded by Harris & Stevens Corporation, that the right would accrue for the appointment of a receiver upon failure to deliver possession as agreed.

The peaceable surrender of possession by Harris & Stevens Corporation to Tarr & McComb, Incorporated, and the taking of possession of the premises under the lease and personal property as above provided by Tarr & McComb, Incorporated, shall be in full satisfaction of all claims and demands against said Harris & Stevens Corporation, and shall be deemed liquidated damages, for failure to carry out the obligations and agreements of said Harris & Stevens Corporation with Tarr & McComb, Incorporated.

In witness whereof, said Harris & Stevens Corporation has caused these presents to be executed by its president and secretary, thereunto duly authorized, and its corporate seal to be hereunto affixed this 4th day of October, 1916.

Executed in duplicate.

HARRIS & STEVENS CORPORATION,

By C. C. Harris, President.

By C. P. E. Menzies, (Acting) Secretary.

(Harris and Stevens Corporation Seal)

State of California, County of Los Angeles—ss.

On this 4th day of October, in the year one thousand

nine hundred and sixteen, before me, Albert A. Kidder, J., a notary public in and for said county of Los Angeles, state of California, residing therein, duly commissioned and qualified, personally appeared C. C. Harris, known to me to be the president, and C. B. E. Menzies, known to me to be the acting secretary, of Harris & Stevens Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

(Notarial Seal) ALBERT A. KIDDER, J.,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT "E."

Assignment of Lease.

Harris & Stevens Corporation, a corporation organized and existing under the laws of the state of California, having its principal place of business in the city of Los Angeles, in said state, in consideration of such indebtedness as now exists or may hereafter be contracted by it to Tarr & McComb, Incorporated, a corporation organized and existing under the laws of the territory of Arizona, whose principal place of business is in Kingman, Mohave county, Arizona, and with an office in Los Angeles, California, does hereby sell, assign and transfer to said Tarr & McComb, Incorporated, and set over all of its right, title and interest

in and to the indenture and lease made the 20th day of September, 1913, between Volcan Oil and Refining Company, a corporation organized and existing under the laws of the state of Arizona, and J. E. Lamb of Bakersfield, Kern county, California, by said J. E. Lamb assigned to C. C. Harris, and by said C. C. Harris assigned to Harris & Stevens Corporation, Incorporated.

This assignment is for the purpose of securing said Tarr & McComb, Incorporated, for all moneys now due from said Harris & Stevens Corporation to Tarr & McComb, Incorporated, or that thereafter may be advanced by said Tarr & McComb, Incorporated, to said Harris & Stevens Corporation, or on their behalf, and further to secure any obligations or indebtedness that may hereafter be incurred or accrue on account of Harris & Stevens Corporation to said Tarr & McComb, Incorporated.

This assignment is subject to all covenants and agreements on behalf of the lessee contained in said lease.

In consideration of the premises and particularly of moneys to be hereafter advanced by said Tarr & McComb, Incorporated, to Harris & Stevens Corporation, the said Harris & Stevens Corporation agree to continue operations under said lease according to the terms and conditions thereof, and agree further as follows:

Said Harris & Stevens Corporation, in the event of any breach of condition of said lease whereby there may be a default therein, or upon failure to operate under said lease effectively, or upon default in any of its indebtedness, or obligations now or hereafter accru-

ing or incurred by or on behalf of said company to Tarr & McComb, Incorporated, will upon demand in writing surrender the possession of the premises to Tarr & McComb, Incorporated, and this assignment shall become fully effective to transfer all the rights, title and interest of said Harris & Stevens Corporation to Tarr & McComb, Incorporated.

Failure for six months to operate at an average production of two thousand (2000) barrels per month, or failure in any one month to produce at least fifteen hundred (1500) barrels, shall be deemed to be failure to operate under this lease effectively.

Harris & Stevens Corporation, when Tarr & McComb, Incorporated, become, as aforesaid, entitled to possession of the properties under the lease, will quit said premises and give Tarr & McComb, Incorporated, peaceful possession of all the property covered by said lease and all materials, tools and appliances used in the operation of said properties, whether owned by lessor or by Harris & Stevens Corporation, and said Tarr & McComb, Incorporated, shall have the right to enter upon and take possession of said premises and personal property without necessity of suit or action, and remove all persons therefrom, but without waiver of right to such action, legal or equitable, as it may be entitled to, it being conceded by Harris & Stevens Corporation, that the right would accrue for the appointment of a receiver upon failure to deliver possession as agreed.

The peaceable surrender of possession by Harris & Stevens Corporation to Tarr & McComb, Incorporated, and the taking of possession of the premises under the

lease and personal property as above provided by Tarr & McComb, Incorporated, shall be in full satisfaction of all claims and demands against said Harris & Stevens Corporation and shall be deemed liquidated damages for failure to carry out the obligations and agreements of said Harris & Stevens Corporation with Tarr & McComb, Incorporated.

In witness whereof, said Harris & Stevens Corporation has caused these presents to be executed by its president and secretary thereunto duly authorized, and its corporate seal to be hereunto affixed, this 4th day of October, 1916.

Executed in duplicate.

HARRIS & STEVENS CORPORATION,

By C. C. Harris, President.

By C. P. E. Menzies, (Acting) Secretary.

(Harris and Stevens Corporate Seal)

State of California, County of Los Angeles—ss.

On this 4th day of October, in the year one thousand nine hundred and sixteen, before me, Albert A. Kidder, Jr., a notary public in and for said county of Los Angeles, state of California, residing therein, duly commissioned and sworn, personally appeared C. C. Harris, known to me to be the president, and C. P. E. Menzies, known to me to be the acting secretary of Harris & Stevens Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand

and affixed my official seal in said county, the day and year in this certificate first above written.

(Notarial Seal) ALBERT A. KIDDER, JR.,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT "F."

This memorandum of agreement, executed this 12th day of March, 1917, by and between Harris & Stevens Corporation, and C. C. Harris, first parties, and Tarr and McComb, Incorporated, second party, and the undersigned creditors of the first parties, as third parties hereto, witnesseth:

Whereas, said third parties are creditors of said Harris & Stevens Corporation and C. C. Harris, and as such, respectively, have and hold severally, claims against said corporation and against said Harris for and on account of goods sold and delivered, money loaned, rent due and services rendered to and accepted by said corporation or said Harris, aggregating the amount shown by the total set opposite the respective names of said creditors, signers hereof, which claims are overdue and unpaid; and

Whereas, said Harris & Stevens Corporation is the owner of a certain lease made May 6, 1915, by E. D. Burge to said corporation for the production of oil from the property therein described for a term ending December 31, 1923, which said lease is on file and of record in the office of the county recorder of the county of Kern, state of California, in book 27 of leases, at page 367, to which record reference is

hereby made for a full and more particular description of said lease; and

Whereas, said corporation is the owner of a certain lease made September 20, 1913, by Volcan Oil and Refining Company, a corporation, to J. E. Lamb, for the production of oil from the property therein described for a term ending September 20, 1923, which said lease is on file and of record in the office of the county recorder of the county of Kern, state of California, in book 29 of leases at page 140, to which record reference is hereby made for a full and more particular description of said lease; and

Whereas, Tarr and McComb, Incorporated, a corporation, hold assignments of said hereinabove described leases and of both thereof as collateral security for moneys advanced to the amount of $..... to said Harris & Stevens Corporation, which said assignments are of date of October 4, 1916; and

Whereas, said Tarr and McComb, Incorporated, on July 24, 1915, entered into a certain agreement with said Harris & Stevens Corporation respecting the purchase of the entire production of oil from the properties described in said leases for a limited period at the price of thirty (30c) cents per barrel f.o.b. the cars at Waits Station, Kern county, California; and

Whereas, said first parties and said second party desire to enter into an agreement for an extension of said last mentioned contract and all of the parties hereto desire to provide a method of payment of the claims of said third parties without litigation.

Now, therefore, in consideration of the premises and of the mutual agreements of the parties hereto herein-

after contained, the first parties agree to sell and deliver to the second party, and the second party agrees to purchase and receive f. o. b. the cars Waits Station, Kern county, California, or into a pipe line at or near the point of production, all of the oil produced from the aforesaid leases and now on hand and unmarketed, and all of the oil which may hereafter be produced from the operation of said leases during the life thereof at and for the following prices and upon the following named terms and conditions, viz: Until all of the claims of said third parties, being the undersigned creditors of said first parties, together with interest thereon at the rate of seven per cent per annum from the 1st day of March, 1917, shall have been fully paid, and second party will pay for all of said oil now on hand and to be produced from the operation of said leases the same price paid at the wells by Standard Oil Company to the producer for oil of equal gravity in the same field, less the sum of twenty-two and one-half (22½) cents per barrel, and said second party will on or before the 15th day of each calendar month pay the aforesaid price for all of said oil produced and delivered to it at said point of delivery during the preceding calendar month to the Citizens National Bank of Los Angeles, which is hereby authorized and directed to collect, receive and receipt for all of said sums of money and shall apply and disburse said sums of money as follows, to-wit: An amount equivalent to thirty (30c) cents per barrel of said oil in payment of rents and royalties accruing upon and pursuant to said leases and for payment of operating expenses thereof accruing from and after the date of this agree-

ment, including the payment of a salary to said C. C. Harris of two hundred fifty ($250) dollars per month if said thirty (30c) cents per barrel shall suffice therefor after payment of the aforesaid expenses, and said Citizens National Bank of Los Angeles shall further and within ten (10) days after receipt of said moneys in each month pay and disburse the balance thereof pro rata to and upon the payment of the claims of said creditors, being the third parties hereto, including interest as aforesaid. It is expressly understood and agreed that the amount of the proceeds of said sales of oil to be disbursed by said Citizens National Bank of Los Angeles for the operation of said leases, for rents and royalties thereon and said salary of C. C. Harris shall not exceed thirty (30c) cents per barrel of said oil.

After said creditors shall have been paid in full as aforesaid, said second party shall take and receive as soon thereafter as convenient from said properties twenty-eight thousand (28,000) barrels of oil for which said second party shall pay said first parties the sum of thirty (30c) cents per barrel, and that thereafter during the life of said leases said second party shall market said oil for not less than said Standard Oil Company's aforesaid price of which said first parties shall have the first thirty (30c) cents per barrel and said second party shall have the next twenty (20c) cents per barrel, and the balance of said price shall be equally divided between said second party and said first parties.

It is further understood and agreed by all of the parties hereto that all of the claims of said third par-

ties shall be further liquidated by the amounts collected and received from all of the accounts receivable of said first parties, all of which said accounts shall be and they are hereby assigned to said Citizens National Bank, or some person to be named by it, for collection, and that all of said accounts shall be accordingly collected by and the proceeds thereof received by said Citizens National Bank, or its said nominee, and that said Citizens National Bank shall promptly, after collection of said accounts, pay and disburse said proceeds to said creditors, being the third parties hereto, pro rata according to the amounts of their respective claims. And it is further understood and agreed that under the direction of said bank there shall be sold oil well casing in and upon said property of the approximate value of three thousand ($3000) dollars, and that the proceeds of such sale or sales shall also be paid and disbursed by said bank to said creditors *pro rata*, according to their respective claims.

It is expressly understood and agreed that until all of the claims of said creditors, third parties hereto, shall have been fully paid, together with interest as aforesaid, said second party will take and receive monthly and pay therefor to said Citizens National Bank at the aforesaid price all of said oil that may be produced from the operation of said leases (and each and every one) and that said second party will also promptly after the execution of this agreement take and receive and pay for within the time limited as aforesaid all of the oil produced from said leases and now on hand, and that upon any default of said second party therein said Citizens

National Bank on behalf of said first parties and of said third parties shall have and take such recourse against said second party for such default as might otherwise be had and taken by said first parties if this agreement were made and entered into between said first parties and said second party only, provided always that in having and taking such recourse said bank shall act upon the direction of a majority amount of said creditors of said first parties and shall apply all of the proceeds or sums of money accruing from any such recourse to and amongst the said creditors pro rata according to their respective claims, including said interest.

It is further agreed that the assignments of said leases to Tarr and McComb, Incorporated, and executed October 4, 1916, shall be and remain in full force and effect, upon the express understanding between all parties hereto that said assignments shall inure to the benefit of all of said creditors. Upon payment of the claims of said creditors said Tarr and McComb, Incorporated, consents that said assignments of said leases shall be and become of no further effect and cancelled.

In consideration of the premises all of said third parties hereby agree to extend the time of payment of their respective claims against said first parties to and including the 1st day of September, 1917, and promise and agree during said period to have or take no recourse for enforcement or security of their said claims, except pursuant to and according to the provisions of this agreement, and said third parties further agree that if on or before the 1st day of September, 1917,

there shall have been paid to and received by them upon their said claims pursuant to this agreement the sum of not less than six thousand ($6000) dollars, exclusive of any sum or sums of money paid to or received by them from the proceeds of sales of said well casing, or from the proceeds of said accounts receivable, then and in that event the said third parties agree that the maturity of their said claims shall be postponed for a further period of six months, and if during said last mentioned extension the amount paid to and received by them to and upon their said claims shall be equal to six thousand ($6000) dollars, the maturity of their said claims shall be again postponed for a third period of six months, and in like manner it is agreed that the maturity of the said claims of said third parties shall be successively postponed by periods of six months whenever and as long as the amount paid to said third parties during the preceding six months shall be not less than the sum of six thousand ($6000) dollars.

Said first parties and said third parties hereby give and grant unto said Citizens National Bank of Los Angeles all of such powers, authorities, rights, estates and interests in and to the property and subject matters of this agreement as may be required or necessary to enable said Citizens National Bank to act for and in behalf of said parties respectively as contemplated and provided for herein and particularly to accomplish the settlement of the claims of said third parties as aforesaid, and this agreement is expressly made for the benefit not only of all of the parties hereto but of said Citizens National Bank.

It is understood and agreed that said Citizens National Bank shall be entitled to retain out of all moneys received and disbursed by it hereunder the compensation of one-half of one per cent (½ of 1%) and such other reasonable costs, fees and expenses as may be requisite in the proper execution of this agreement.

It is further understood and agreed that unless all of the creditors of said first parties shall execute this agreement on or before the 20th day of March, 1917, that thereupon this agreement shall be null and void and all of the parties hereto shall be released of all liability thereunder.

Executed in triplicate this 12th day of March, 1917.

(Corporation Seal)

HARRIS & STEVENS CORPORATION,
By C. C. Harris, President.
By C. P. E. Menzies, Secretary.

TARR and McCOMB, Incorporated,
By Harry McComb, President.
By N. W. Tarr, Secretary.

The Citizens National Bank of Los Angeles hereby approve the within and foregoing agreement and agrees to act as trustee and representative of the respective parties therein named as provided for therein.

CITIZENS NATIONAL BANK
OF LOS ANGELES
By Wm. W. Woods, V. Pr.

CREDITORS, PARTIES OF THE THIRD PART.

Names	Amount
R. H. Herron Co.	$1851.93
Address N. Main & Alameda	37.58 interest
	$1889.51

Tarr & McComb Inc.
Address by Harry McComb, Pres. ———
Mar. 12, 1917.

The Citizens National Bank of Los Angeles
By Wm. W. Woods, V. Pr.
Address ———
Mar. 12, 1917.
Address ———

Standard Oil Company
J. T. Quinn
Address ———

Mills Iron Works
E. C. Mills
Address ———
Mar. 13, 1917.

Rude & Opp
Per O. H. Rude
Address ———
Mar. 13, 1917.

Mack Motor Truck Co.
J. B. Somer
Address ———
3/13/17

M. L. McCray Oil Co.
By Harriet E. Beers
Address ———

Crescent Refining & Oil Co.
By B. F. Alps 3/13/17
Address ———

F. C. Kurrle,
3/13/17
Address ———

A. L. Blake Mar. 14-17
By Mrs. A. L. Blake
Address ———

United States Fidelity & Guaranty Company
By A. R. Schroeder
Address ———

E. A. Featherstone
O. O. Scott, Secty
Address ———

Perkins Bros.
Per R. B. Perkins
Address 217 W. 12 St. L. A. $86.00

Pike Automobile & Wagon Works
By J. L. Pike
Address 317 Central Ave. L. A. ———

Warren & Baily Mfg. Co.
Address E. A. Clark Secy
359 N. Main St. Los Angeles ———

J. G. Gano Mch 17, 1917
Address 959 Adobe St ———

Earl P. Cooper Co.
By G. F. Steppens
Address 1310 S. L. A. St. ———

S. E. Carter les Mc. by
H. C. Robbins Secy.
Address ———

Hercules Oil Refining Co.
Address O. N. Seller Jr. ———

Axelson Machine Co.
Address 1406 San Fernando St. 170.56
L. A. ———

Chas. Victor Hall Mch/20
Address 2131 Ocean View Ave
City ———

Mch. 20, 1917
Matt T. Mancha & Co.
Address 311 Security Bldg. ———

Electric Equipment Co. (Inc.)
By Negold $68.16
Address ———

General Petroleum Corporation
Rodney S. Austin Comptroller
3/20/17
Address ———

Southwest Welding & Mfg. Co.
3/20/17 By J. D. Wiley Cashier
Address ———

Kerckhoff-Cuzner Mill & Lumber Co.
3/20/17
Address By J. D. Wiley Cashier ———

U. S. Fidelity & Guaranty Co.
3/20 Per M. C. Cralle
Address ———

3/20 Advance Truck Co. H. Goffels
Address 1417 No. Main ———

Master Carburetor Corporation
Los Angeles Branch Office
3/20 Chas. G. Harnes
Address 922 So. Los Angeles St. ———

L. A. Auto Equipment Repair Co.
3/20/17 M. W. Weiss
Address 307 W. Pico St. ———

3/20/17 R. A. Dallugge
Address ———
3/20/17 E. A. Clampitt
Address 1037 N. Alameda St. ———

A. F. Gilmore Co.
Address 827 Mer. Nat. Bk. Bldg. ———
March 19/1917 E. B. Gilmore
Mgr. & Sect.

C. C. Harris Oil Co.
Address #701 College St. ———
By E. R. Snyder - Secy.

Richfield Oil Co.
Mr. G. O. B. Winton, Secy.
Address _____

Estate of Adolphus Busch,
Per E. V. Krug Mgr.
Address _____

Pacific Mill and Mine Supply Co.
Per F. Moulin Assistant Secretary _____

(Licktenberger-Feogusen Co.
(L. A. Saddlery & F. Co. by Chatard 6/13/17

The undersigned hereby acknowledges notice of the contents of the above and foregoing instrument, of the trust therein created, and of its appointment as trustee therein named. It hereby accepts said trust.

CITIZENS NATIONAL BANK
OF LOS ANGELES
By .....
E. A. HARDISON PERFORATING CO.
BROWN & BIGELOW
M. P. FLICKINGER
HOPPER MACHINE WORKS
By E. M. Hopper
H. E. JAYNES Oxyocetylene Nuklay
THE MARVEL COMPOUND CO.

[Endorsed]: No. D 32 Eq. Dept. .. In the District Court of the United States, in and for the Southern District of California, Southern Division. Harris and Stevens Corporation, a corporation, and C. C. Harris, plaintiffs, vs. Tarr & McComb, incorporated, a corporation, defendant. Complaint in Equity. Filed

Jul. 16, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Cates & Robinson, suite 701 Washington Building, Los Angeles, Cal., attorneys for plaintiff.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Plaintiffs,

vs.

TARR & McCOMB, Incorporated, a Corporation,

Defendant.

No. In Equity.

Motion to Dismiss.

Now comes Tarr and McComb, incorporated, a corporation, the defendant in the above entitled action, and moves the court to dismiss this action and that it takes its costs in this suit incurred for the following reasons:

I.

Because it appears in the complaint filed in this cause that certain indispensable parties defendant, to-wit: some of the creditors of the plaintiffs as shown by Exhibit F, the trustee for said creditors and one of the lessors in the leases described, are citizens of the same state as the state in which the plaintiffs are citizens, and therefore no diversity of citizenship exists as alleged and upon which basis the court is alleged to have jurisdiction.

II.

That it appears from the complaint filed in this cause that there is a misjoinder of parties plaintiff in that plaintiff C. C. Harris is not interested in the subject matter of the suit and is not entitled under the allegations of the complaint to any of the relief sought.

III.

That there is insufficiency of fact to constitute a valid cause of action in equity against the defendant.

IV.

That there is a non-joinder of indispensable parties, to-wit, the creditors of plaintiffs, the trustees for said creditors plaintiffs and defendant, and the lessors of the leases set out in the complaint.

CHARLES C. MONTGOMERY,
Solicitor for Defendant.

LYNN HELM,
Of Counsel.

[Endorsed]: Original. No. D 32 Eq. United States District Court, Southern District of California, Southern Division. Harris and Stevens Corporation, a corporation, and C. C. Harris, plaintiffs, vs. Tarr & McComb, Incorporated, a corporation, defendant. Motion to Dismiss. Received copy of within motion to dismiss this 4th day of August, 1917. Cates & Robinson, attorney for plaintiffs. Filed Aug. 4, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Plaintiffs,

vs.

TARR & McCOMB, Incorporated, a Corporation,

Defendant.

No. D-32. In Equity.

Decree Dismissing Suit on Defendant's Motion to Dismiss.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, on the 22nd day of October, 1917, the Honorable Oscar A. Trippet, District Judge, announced his decision, and caused a minute entry thereof to be made as follows:

"This cause having heretofore been submitted to the court for its consideration and decision on defendant's motion to dismiss the bill of complaint; the court, having duly considered the same, and being fully advised in the premises, now announces its conclusions thereon, and it is accordingly ordered that said motion of defendant to dismiss the bill of complaint be, and same hereby is granted."

It is, therefore, ordered, adjudged and decreed as follows, viz:

That defendant's motion to dismiss be sustained, and that this cause be and hereby is dismissed, and

that defendant recover from plaintiffs its costs herein expended.

BLEDSOE,
District Judge.

Judge Trippet being absent, it is stipulated that the signature to the foregoing order may be by Judge Bledsoe, O. K. as to form.

CATES & ROBINSON,
Solicitors for Plaintiffs.

Decree entered and recorded October 25th, 1917.

WM. M. VAN DYKE, Clerk.
By T. F. Green, Deputy.

[Endorsed]: No. D-32. In Equity. United States District Court in and for the Southern District of California, Southern Division. Harris & Stevens Corporation, a corporation, and C. C. Harris, plaintiffs, vs. Tarr & McComb, Incorporated, a corporation, defendant. Decree Dismissing Suit on Defendant's Motion to Dismiss. Filed Oct. 25, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Charles C. Montgomery, attorney for plaintiff, 908 Security Building, Los Angeles, California.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Plaintiffs,

vs.

TARR & McCOMB, Incorporated, a Corporation,

Defendant.

No. D-32. In Equity.

Petition for Appeal.

The above named plaintiffs, Harris and Stevens Corporation and C. C. Harris, believing themselves to be aggrieved by the decree of this court made and entered in this cause on the 25th day of October, 1917, dismissing plaintiffs' bill of complaint in the above entitled cause, hereby appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that this, their bill, may be allowed and that citation issue as provided by law, and that a transcript of record and proceedings and papers in said cause upon which the decree was made, may be sent, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the Post Office Building in the city and county of San Francisco, state of California.

HARRIS and STEVENS CORPORATION.
C. C. HARRIS.
By their attorneys,
CATES & ROBINSON,
Suite 701 Washington Building, 311½ South Spring Street, Los Angeles, California.

[Endorsed]: Original. No. D-32. In equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Harris and Stevens Corporation, a corporation, et al., plaintiffs, vs. Tarr & McComb, incorporated, a corporation, defendant. Petition for Appeal. Filed Nov. 24, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Cates & Robinson, suite 701 Washington Building, Los Angeles, Cal., attorneys for plaintiffs.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Plaintiffs,

vs.

TARR & McCOMB, Incorporated, a Corporation,

Defendant.

No. D-32. In Equity.

Assignments of Error.

The plaintiffs above named, by Cates & Robinson, their attorneys, assign errors to the decree entered in this cause because the learned trial judge erred:

First: In dismissing the complaint herein for want of jurisdiction.

Second: In dismissing the complaint herein on the ground that certain indispensable parties defendant, to-wit, some of the creditors of plaintiffs as shown by Exhibit "F" to plaintiffs' complaint, the trustee for said

creditors and one of the lessors in the leases described are citizens of the same state as the state in which the plaintiffs are citizens, and that no diversity of citizenship exists.

Third: In dismissing the complaint herein on the ground that there is a misjoinder of parties plaintiff in that plaintiff, C. C. Harris, is not interested in the subject matter of the suit, and is not entitled under the allegations of the complaint to any of the relief sought.

Fourth: In dismissing the complaint herein on the ground that there is insufficiency of fact to constitute a valid cause of action in equity against the defendant.

Fifth: In dismissing the complaint herein on the ground that there is a misjoinder of indispensable parties, to-wit, the creditors of the plaintiffs, the trustee for said creditors, plantiffs and defendant and the lessors of the leases set out in the complaint.

Sixth: In entering the decree herein dated the 25th day of October, 1917.

Wherefore plaintiffs pray that the decree of said District Court of the United States for the Southern District of California be reversed, and that said court may be directed to correct its error in entering the decree dismissing the bill of complaint, and to require the defendant to answer in said cause.

Dated Los Angeles, California, November 19th, 1917

Yours, etc.,

CATES & ROBINSON,

Attorneys for Plaintiffs.

Suite 701 Washington Building, 311½ South Spring Street, Los Angeles, California.

[Endorsed]: Original. No. D-32. In equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Harris and Stevens Corporation, a corporation, et al., plaintiffs, vs. Tarr & McComb, incorporated, a corporation, defendant. Assignment of Error. Filed Nov. 24, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Cates & Robinson, suite 701 Washington Building, Los Angeles, Cal., attorneys for plaintiffs.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Plaintiffs,

vs.

TARR & McCOMB, Incorporated, a Corporation,

Defendant.

No. D-32. In Equity.

Order Granting Petition for and Allowing Appeal.

The petition for appeal herein is granted and the appeal allowed upon giving bond conditioned as required by law, in the sum of three hundred ($300.00) dollars.

Dated at Los Angeles, California, November 24, 1917.

TRIPPET,

Judge of the District Court of the United States, for the Southern District of California, in the Ninth Circuit.

[Endorsed]: Original. No. D-32. In equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Harris and Stevens Corporation, a corporation, et al., plaintiffs, vs. Tarr & McComb, incorporated, a corporation, defendant. Order Granting Petition for and Allowing Appeal. Filed Nov. 24, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Cates & Robinson, 701 Washington Building, Los Angeles, Cal., attorneys for plaintiffs.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS.

Plaintiff-Appellants,

vs.

TARR & McCOMB, Incorporated, a Corporation,

Defendant-Respondent.

No. D-32. In Equity.

Bond on Appeal.

Know all men by these presents: That Harris and Stevens Corporation, a corporation, and C. C. Harris, as principals, and United States Fidelity & Guaranty Company, a corporation under the laws of the state of Maryland, with its principal place of business in the city of Baltimore, state of Maryland, as surety, are held and firmly bound unto the above named Tarr & McComb, Incorporated, a corporation, in the sum of three hundred ($300.00) dollars, to be paid to the

said Tarr & McComb, Incorporated, for the payment of which well and truly to be made said principals and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed and dated the 14th day of November, 1917.

Whereas, the above named Harris and Stevens Corporation and C. C. Harris have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree rendered in the above entitled suit by a judge of the District Court of the United States, for the Southern District of California:

Now, therefore, the condition of this obligation is such that if the above named Harris and Stevens Corporation and C. C. Harris shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

UNITED STATES FIDELITY &
GUARANTY COMPANY,
By Fred S. Hughes,
Attorney-in-Fact.
(Corporate Seal)

State of California, County of Los Angeles—ss.

On this 14th day of November, 1917, before me personally came Fred S. Hughes, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the United States Fidelity & Guaranty Company, the corporation de-

scribed in and which executed the foregoing bond of Harris and Stevens Corporation and C. C. Harris as surety, and acknowledged to me that he subscribed the name of United States Fidelity & Guaranty Company thereto as principal, and his own name as attorney-in-fact, and who being by me duly sworn, did depose and say that he resides in the city of Los Angeles, state of California, and that he knows the corporate seal of said corporation; that the said United States Fidelity & Guaranty Company is duly incorporated under the laws of the state of Maryland, that said company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within bond of Harris and Stevens Corporation and C. C. Harris is the corporate seal of said United States Fidelity & Guaranty Company and was thereto affixed by authority of the board of directors of said company; and that the assets of said company unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever by more than the sum of $1,000,000.00.

FRED S. HUGHES.

Signed, sworn to and acknowledged before me this 14th day of November, 1917.

(N. S.) AGNES L. WHITE,

Notary Public in and for the county of Los Angeles, State of California.

The within and foregoing bond on appeal is approved.

Dated Los Angeles, California, November 24, 1917.

TRIPPET,

District Judge.

[Endorsed]: No. D-32. In equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Harris and Stevens Corporation, a corporation, et al., plaintiffs, vs. Tarr & McComb, incorporated, a corporation, defendant. Bond on Appeal. Filed Nov. 24, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Cates & Robinson, suite 701 Washington Building, Los Angeles, Cal., attorneys for plaintiffs.

United States of America, District Court of the United States, Southern District of California.

HARRIS AND STEVENS CORPORATION, a Corporation, and C. C. HARRIS,

Plaintiffs,

vs.

TARR & McCOMB, Incorporated, a Corporation,

Defendant.

Clerk's Office. No. D-32. In Equity.

Praecipe for Record.

To the Clerk of Said Court:

Sir: Please certify copies of the following papers on file in your office to be used as part of the record on appeal in this case before the United States Circuit Court of Appeals for the Ninth Circuit:

Complaint and exhibits annexed.

Motion of defendant to dismiss the bill.

Final decree.

Petition for appeal and order allowing the same.

Citation.

Bond on appeal.

Assignments of Error.

Praecipe.

Clerk's certificate of correctness of transcript of record.

Respectfully yours,

CATES & ROBINSON,

Attorneys for Plaintiffs.

Suite 701 Washington Building, 311½ South Spring Street, Los Angeles, California.

Dated Los Angeles, California, November 19th, 1917.

[Endorsed]: Original. No. D-32. In equity. U. S. District Court, Southern District of California, Sou. Div. Harris and Stevens Corporation, a corporation, and C. C. Harris, plaintiffs, vs. Tarr & McComb, incorporated, a corporation, defendant. Praecipe for Record. Filed Nov. 24, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk.

No. 3101.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harris and Stevens Corporation, a Corporation, and C. C. Harris,

Appellants,

vs.

Tarr & McComb, Incorporated, a Corporation,

Appellee.

BRIEF FOR APPELLANTS.

CATES AND ROBINSON,
Attorneys for Appellants.

ALTON M. CATES,
Of Counsel.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 3101.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harris and Stevens Corporation, a Corporation, and C. C. Harris,

Appellants,

vs.

Tarr & McComb, Incorporated, a Corporation,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT.

On March 20, 1917, and for a long time prior thereto, the appellant Harris and Stevens Corporation was in the possession of and in the quiet and peaceable enjoyment and use of the real property described in the bill and situate in the county of Kern, state of California, under two different leases [Trans. pp. 17-24] and [Trans. pp. 24-33].

On July 24, 1915, appellant Harris and Stevens Corporation entered into an agreement with the appellee for the sale of all crude petroleum produced from said real property for a period of three years from said date, with the right and option by the appellee to extend the time for a further period of two years upon giving notice, for the sum of thirty cents per barrel, but the appellee did not agree to take and receive said production in the event that it should be unable to sell said production for thirty cents per barrel at or upon the property [Trans. pp. 33-38].

On October 4, 1916, for the purpose of securing the payment of moneys advanced and to be advanced to the appellant Harris and Stevens Corporation said appellant corporation assigned to said appellee said leases [Trans. pp. 39-42 and Trans. pp. 42-46].

Early in the year 1917 the appellants became indebted to sundry individuals, copartnerships and corporations in an amount aggregating about forty thousand dollars. On March 12, 1917, appellants, appellee and said creditors entered into an agreement by the terms of which provision was made for the payment of the claims of all creditors, including the claim of appellee as a creditor, together with interest thereon at seven per cent per annum [Trans. pp. 46-59]. The agreement further provided that in the event all of the creditors did not become parties thereto on or before March 20, 1917, it should become void.

All of the creditors, with the exception of three holding claims aggregating about three thousand dollars, joined in said agreement before March 20, 1917, and

upon the refusal of said three creditors to join in said agreement, and on March 21, 1917, upon the representation by the appellee to appellants that it would protect the interests of the appellants and the creditors who had signed said agreement, including itself, appellants surrendered possession of the real property and all personal property located thereon to the appellee.

Thereafter all of the creditors became parties to said agreement of March 12, 1917 [Trans. p. 13], and prior to the filing of the bill herein, all of said creditors received and receipted for a dividend to be applied upon the payment of their several claims [Trans. pp. 12-13].

The property described in the bill is all of the property of appellant Harris and Stevens Corporation and the property of said appellant C. C. Harris was heavily encumbered and appellants were without any money or property whatsoever, except as above stated.

At the time of the surrender of the possession of said property, the appellants had performed and carried out all of their obligations and agreements with the appellee and with the lessors in said leases. No consideration whatsoever was paid to appellants, or to either of them, by the appellee for the surrender of the possession of said property.

Before the commencement of this action appellants repeatedly demanded of appellee that it render them a just and true account of the expenses of operation of said property, which demand the appellee refused, and on or about the 29th day of June, 1917, appellants demanded the surrender to appellant Harris and

Stevens Corporation of the possession of said property, and demanded that appellee allow said property to be operated in accordance with the stipulations, agreements and conditions contained in said agreement of March 12, 1917 [Trans. pp. 46-59], between the appellants, the appellee and the creditors of appellants, which demand appellee refused.

Motion to Dismiss.

The bill of complaint herein was filed July 16, 1917, and on August 4, 1917, appellants were served with motion to dismiss, upon the following grounds:

"1. Because it appears in the complaint filed in this cause that certain indispensable parties defendant, to-wit, some of the creditors of the plaintiffs as shown by Exhibit F, the trustee for said creditors and one of the lessors in the leases described, are citizens of the same state as the state in which the plaintiffs are citizens, and therefore no diversity of citizenship exists, as alleged and upon which basis the court is alleged to have jurisdiction.

"2. That it appears from the complaint filed in this cause that there is a misjoinder of parties plaintiff in that plaintiff C. C. Harris is not interested in the subject matter of the suit and is not entitled under the allegations of the complaint to any of the relief sought.

"3. That there is insufficiency of fact to constitute a valid cause of action in equity against the defendant.

"4. That there is a non-joinder of indispensable parties, to-wit, the creditors of plaintiffs, the trustees for said creditors plaintiffs and defendants, and the

lessors of the leases set out in the complaint." [Trans. pp. 59-60.]

On October 25, 1917, a decree dismissing the bill was entered.

Specification of Errors.

There was no opinion filed by the court below on dismissing the bill of complaint; accordingly we must assume that the order dismissing the bill and the decree entered, were made upon all the grounds stated in appellee-defendant's motion to dismiss.

1. The court erred in dismissing the bill for want of jurisdiction.

2. The court erred in dismissing the bill upon the ground that no diversity of citizenship exists, for the reason that some of the creditors of plaintiffs-appellants, the trustee for said creditors, and one of the lessors are citizens of California, of which state plaintiffs-appellants are citizens.

3. The court erred in dismissing the bill upon the ground that there is a misjoinder of parties plaintiff-appellant in that plaintiff-appellant C. C. Harris is not interested in the subject matter of the suit.

4. The court erred in dismissing the bill on the ground that there is insufficiency of fact to constitute a valid cause of action in equity against the defendant-appellee.

5. The court erred in dismissing the bill on the ground that there is a misjoinder of indispensable parties in that the creditors of plaintiffs-appellants, the

trustee for the creditors and for plaintiffs-appellants and defendant-appellee, and the lessors in the leases set out in the bill of complaint are not made parties to the cause.

POINTS AND AUTHORITIES.

I.

Indispensable Parties.

As to the question of who are indispensable parties, a full discussion of the subject is had in Barney v. Baltimore, 6 Wall 280, 18 Law Ed. 825, in which Mr. Justice Miller delivering the opinion of the court said:

> "This class (indispensable parties) cannot be better described than in the language of this court in Shields v. Barrow, 17 How. 130, in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' * * *
>
> "Nor does the act of February 28, 1839 (5 Stat. at L. 321), relieve the case of the difficulty. That act has been frequently construed in this court, and perhaps never more pertinently to the matter in hand than in the case already cited, of Shields v. Barrow.
>
> "The court there says, in relation to this act, that 'It does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction, and so far as it touches suits in

equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of Cameron v. McRoberts, 3 Wheat. 591; Osborn v. Bank of U. S., 9 Wheat. 738; and Harding v. Handy, 11 Wheat. 132. * * * The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court in Mallow v. Hinde, 12 Wheat. 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court"; so that while this act removed any difficulty as to jurisdiction between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the cast last mentioned. * * * It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete, and final justice cannot be done between the parties to the suit without affecting those rights.' North Ind. R. R. Co. v. Mich. Cent. R. R. Co., 15 How. 233."

In the case at bar, the only relief sought is that the possession of the leased property be delivered by the appellee to Harris and Stevens Corporation, one of the appellants herein, and an accounting be had. No relief

is sought against the creditors, against the lessors nor against the trustee, and no attack is made upon the validity either of the leases or of the creditors' agreement of March 12, 1917.

The said agreement of March 12, 1917 [Trans. pp. 46-59], provides that the appellee herein shall purchase and pay for the production from the leased premises, that the expenses of operating the property shall be paid from the receipts from production, that twenty-two and one-half cents per barrel shall be retained by the appellee as marketing charges, and the balance shall be distributed by the trustee pro rata among the creditors. There is nothing in the agreement which deprives or attempts to deprive the appellant Harris and Stevens Corporation of the possession of the property, it being recited in the agreement that the defendant hold assignments of leases upon the property in question, and that upon payment in full of all the creditors, these assignments shall be cancelled and become void.

> "A party is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience. That is to say his presence as a party is indispensable where his rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights. If the decree must be pursued against one, or if he must be active in its performance, his presence is indispensable. The rules in regard to parties generally are founded in part on artifi-

cial reasoning, partly in considerations of convenience, and partly in the solicitude of courts of equity to suppress multifarious litigation; but the rule as to indispensable parties is neither technical nor one of convenience; it goes absolutely to the jurisdiction, and without their presence the court can grant no relief. Thus, where the object of a bill is to divest a title to property, the presence of those holding or claiming such title is indispensable. The rescission of an agreement requires the presence of all claiming property through such agreement, and the impeachment of a judgment the presence of plaintiff in such judgment. Sometimes an interest less directly intervenes which the decree must necessarily affect, but in such case the holder of such interest is none the less indispensable."

16 Cyc. 189, 190.

The question as to whether "one of the lessors in the leases described" is an indispensable party is disposed of by the fact that where an assignment of a lease has once been made with the consent of the lessor, it being provided in the lease that such assignment cannot be made without his consent, the restriction against assignment is forever removed.

In this connection see:

Chipman v. Emeric, 5 Cal. 49.

II.

The Appellant, C. C. Harris, Is Not Improperly Joined as a Party Plaintiff. He Has an Interest in the Subject Matter of the Suit and Is Entitled, Under the Allegations of the Bill, to the Relief Sought.

The agreement of March 12, 1917 [Trans. pp. 46-59], specifically provides that it is made for the benefit of both appellants, and that from the proceeds arising from the production of oil from the leased premises the said appellant C. C. Harris shall receive, if sufficient moneys shall be realized, two hundred fifty dollars per month [Trans. p. 49].

III.

The Bill of Complaint States a Cause of Action in Equity Against the Appellee.

Counsel for appellee, in support of the contention that the bill does not state a cause of action in equity against the appellee, rely upon the case of

Dent v. Ferguson, 132 U. S. 50, 62.

In this case an agreement was made between the grantor, Ferguson, and the grantee, Dent, by which agreement there was reserved to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors of the grantor had a right of immediate appropriation to their debts, and which involved a secret trust for a return to the grantor of the property of which such creditors had the immediate right of sale. This agreement the court held would not be enforced and the parties must be left in the

position where they had placed themselves, although the grantee refused to perform his part of the fraudulent agreement with the grantor.

This case was decided upon the theory that the parties were *in pari delicto.*

The Situation Here Is Entirely Different, and It Is Submitted That the Appellants Are Not in Pari Delicto With the Appellee.

In Colby v. Title Insurance and Trust Company, 160 Cal. 632, at page 641, the court quotes with approval from 6 American and English Enc. of Law, page 416, as follows:

> "But when the parties do not stand *in pari delicto,* and it appears that the contract or deed was obtained by duress, equity will not refuse its aid. Thus when the inequality in the situation of the parties is such that it is apparent the act was not voluntary as where one of the parties exacts a security which the other is driven to give in order to save one dear to him from exposure, disgrace and ruin, equity will set aside the contract or deed so obtained."

The court also quotes with approval from 6 Cyc., page 316:

> "Although both parties are chargeable with knowledge that their agreement is contrary to some rule of law, yet, if one of them acts under duress, or what the law regards as undue influence on the part of the other, they do not stand on an equal footing and the weaker one may be granted affirmative relief."

Admitting, for the purpose of this argument, that the appellants were *in delicto* when they surrendered the possession to the appellee of the property described in the bill, yet they were not *in pari delicto* with the appellee. All of the creditors, with the exception of three holding claims aggregating three thousand dollars, had signed and become parties to the creditors' agreement of March 12, 1917, and, as alleged in the bill, appellee agreed to protect these creditors, whom appellants desired to protect. Appellants also desired to protect the appellee in its rights, and under its representations that the creditors who had signed the agreement, including appellee, would be *protected,* appellants surrendered possession of the property to the appellee.

The apellants were in the position where they must repose the utmost trust and confidence in the appellee. Appellants, appellee and all the creditors of appellants, except the three dissenting creditors, had been engaged in an honest and fair endeavor to so arrange the financial affairs of appellants as to provide for the payment of all of appellants' debts and preserve their property. Appellants and appellee, by the terms of the so-called creditors' agreement of March 12, 1917 [Trans. pp. 46-59], had provided that, instead of appellants receiving only thirty cents per barrel for the crude oil produced from the leased premises, such production should be sold for the highest price obtainable and applied through the trustee to the liquidation of all appellants' indebtedness. Even a casual reading of said creditors' agreement must, we believe, carry the conviction that

appellants were acting in the utmost good faith and were endeavoring, by every means in their power, to do their bounden duty, i. e., pay every dollar they owed, together with interest. It cannot be that under all these circumstances it will be said that, even though appellants, in a moment of panic and fearing disaster to their plans to liquidate all their indebtedness, surrendered possession of the leased premises to the appellee, relying upon its promise to protect the creditors who had signed and become parties to said agreement, now after *all* the creditors have agreed to the plan of payment and have received dividends upon their claims [Trans. pp. 12-13], appellants shall be deprived of the possession of their property.

The creditors' agreement further provides:

> "It is further agreed that the assignments of said leases to Tarr and McComb, Incorporated, and executed October 4, 1916, shall be and remain in full force and effect, upon the express understanding between all parties hereto that said assignments shall inure to the benefit of all of said creditors. Upon payment of the claims of said creditors said Tarr and McComb, Incorporated, consents that said assignments of said leases shall be and become of no further effect and cancelled." [Trans. p. 51.]

Not only is there nothing contained in said creditors' agreement which even hints at a justification on the part of the appellee in holding *possession* of the leased premises, but, as will be seen by the above quotation, the agreement—and this is the agreement under which all parties are now operating [Trans. pp. 12-13]—

expressly provides that upon payment of the claims of the creditors the assignments of the leases upon the property shall be cancelled and appellant Harris and Stevens Corporation shall assume full control of the property, subject only to a continuing contract to sell the oil produced therefrom to the appellee, making certain division of the amount received [Trans. p. 49].

By reason of the surrender by appellants to the appellee of the possession of the property described in the bill of complaint, no creditor was preferred to another creditor, nor was any creditor induced to take any amount for his claim less than the full amount thereof, together with interest thereon at seven per cent per annum from the 12th day of March, 1917, until payment shall be made in full.

No one has been injured, no question of moral turpitude is involved and all the creditors will either be paid from the proceeds arising from the operation of the property or from the property itself, which is alleged in the bill to be of a value in excess of fifty thousand dollars, and the aggregate claims of creditors to have been not to exceed forty thousand dollars on March 12, 1917.

The true test as to whether relief will be granted is stated most clearly in

Starke v. Littlepage, 4 Rand (Va.) 368,

Where the court says:

> "The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in

equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transaction."

A debtor who, to delay or defraud his creditors, has transferred property, without consideration, to a participant in the fraud, may, on abandoning his fraudulent purpose and apprising the other party thereof, recover possession of the property in order to pay his creditors.

Carll v. Emery (Mass.), 1 L. R. A. 618.

In the case last above cited the court in the last two paragraphs of the opinion said:

"That a fraudulent transaction may be purged of the fraud by the subsequent action of the parties is well settled. Thus, if the checks transferred to the defendants had been fully paid for to the plaintiffs, and the sum had gone to the plaintiffs' creditors, the transaction would have been purged of fraud and the defendants would have had a good title thereto. Thomas v. Goodwin, 12 Mass. 140; Oriental Bank v. Haskins, *supra*."

"It would seem equally clear that when a party who has transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party who has been a participant in the fraudulent transaction by reason of such participation should be able to hold the property, the possession of which he had so acquired, and

thus prevent it from being devoted to its legitimate uses."

Badarocco v. Badarocco, 10 N. M. 767, 65 Pac. 153.

The bill alleges that the appellee did not pay the appellants any consideration whatever for the surrender of possession of said property.

The Surrender of the Possession of the Property Described in the Bill Was Not in Fraud of Creditors, Because Whatever the Intent of the Appellants and Appellee May Have Been, No Creditor Has Been Injured.

In order to avoid a conveyance on the ground that it was made in fraud of creditors, it must be shown that a creditor was injured by the conveyance.

Albertoli v. Branham, 80 Cal. 631;
Brown v. Campbell, 100 Cal. 635;
Wagner v. Law (Wash.), 15 L. R. A. 784.

"In order that a conveyance or transfer may be attacked as being fraudulent and void as against creditors, it is necessary, even where there is an actual fraudulent intent, that prejudice to the rights of creditors shall result therefrom, for fraud does not consist in mere intent not resulting in injury."

20 Cyc. 416, 417, and cases there cited.

"No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach. In other

words, to entitle a creditor to set aside a conveyance as fraudulent, it is necessary not only that there be fraud on the part of the vendor, participated in by the vendee, but also that there be an injury to the person complaining."

12 R. C. L. 491.

The fact that there was a mental process to cheat, does not affect the transaction.

Gunderman v. Gunnison, 39 Mich. 313.

The Creditors of the Appellants Not Only Have Not Been Defrauded, but if the Act of Surrender of Possession of the Property Herein Was Fraudulent, It Is Now Purged of Fraud.

"A fraudulent conveyance may also be rendered valid by the subsequent assent or confirmation of the creditors entitled to avoid the same, whether such assent or confirmation be expressed or implied from the receipt by them of the purchase money from the grantor or grantee, or proceeding against the grantee therefor, or from the receipt of the proceeds of a sale of the property or a dividend under an assignment or deed of trust."

20 Cyc. 416, and cases there cited.

"It requires no citation of authority to show that a creditor who assents, e. g., to an assignment by his debtor, containing a provision sufficient to avoid it as fraudulent, such as a trust for the debtor, is barred by his consent from raising objection afterwards to the assignment for any cause known to him when he assented."

Bigelow on Fraudulent Conveyances, p. 482.

Unless the appellants shall secure relief in equity, the very object sought to be accomplished by the creditors' agreement will be defeated, for the reason that the appellee, as one of the creditors, will have been allowed to obtain an unconscionable advantage to the ruin of the appellants; and the creditors, other than the defendant, have signed and become parties to the creditors' agreement upon a misrepresentation of fact, the representation in the creditors' agreement being that the appellants should have possession of and operate the property, that the creditors should be paid in full, together with seven (7%) per cent interest upon their claims, and that thereupon the assignments of said leases held by the appellee for the benefit of all the creditors should be cancelled and become of no effect; whereas, on the contrary, the appellee will have possession of the property and will have obtained an advantage not only of the appellants, but of all the other creditors, parties to said creditors' agreement, in that after the other creditors shall have had their claims paid in full, it will still be possessed of property of the value of more than fifty thousand dollars without having paid any consideration therefor.

The Appellants Are Entitled to Recover Possession of the Property, the Subject of this Action, and Are Also Entitled to an Accounting.

The rule in equity is well established that where one person occupies a relation in which he owes a duty to another, he shall not place himself in any position which will expose him to the temptation of acting contrary

to that duty or bring *personal interest* in conflict with his duty. If he does so act, a court of equity will not inquire whether he has in fact violated his duty, but will grant relief irrespective of his good or bad faith, if the other party to the fiduciary relation desires it. This rule applies to every person who stands in such situation that he owes a duty to another, and courts of equity have never fettered themselves by defining particular relations to which alone it will be applied.

10 R. C. L. 350;

Trice v. Comstock, 120 Fed. 620, 57 C. C. A. 656, 61 L. R. A. 176;

Boyd v. Blankman, 29 Cal. 19;

Ellicott v. Chamberlin, 38 N. J. Equity 604, 48 American Reports 327;

Schieffelin v. Stewart, 1 Johns Chancery (N. Y.) 620, 7 Am. Decs. 507, and note;

Gardner v. Ogden, 22 N. Y. 327, 78 Am. Decs. 192, and note.

Where a conveyance is made without any consideration and it appears from the circumstances that the grantee was not intended to take beneficially, equity will declare a resulting trust.

Avery v. Stewart, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776.

The mere absence of a consideration for the surrender of the possession of the property described in the

complaint raises the presumption of fraud, imposition or undue influence.

Odell v. Moss, 130 Cal. 352, 358;
Hays v. Gloster, 88 Cal. 560, 566.

We respectfully submit that appellants are entitled to the relief sought by the bill and that the decree of the District Court should be reversed.

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Of Counsel.

No. 3101.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Harris and Stevens Corporation, a Corporation, and C. C. Harris,

Appellants,

vs.

Tarr & McComb, Incorporated, a Corporation,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

STATEMENT.

May It Please Your Honors:

This is an appeal by plaintiffs from a decree sustaining defendant's motion to dismiss their complaint.

The motion was sustained generally.

No leave to amend was requested.

Defendant's main contention is:

"3. That there is insufficiency of fact to constitute a valid cause of action in equity against defendant." [Tr. p. 60.]

Appellants state the nature of the relief to which they claim they are entitled on page 9 of their brief thus:

"In the case at bar, the only relief sought is that the possession of the leased property be delivered by appellee to Harris and Stevens Corporation, one of the appellants herein, and an accounting be had."

As to whether there exists a right to an accounting that seems to depend under appellants' argument on the right to regain possession of the premises in dispute.

But, even if the right to an accounting exists by reason of some alleged default of defendant, nevertheless under the agreement under which appellants claim the default arose, appellants have expressly conferred on their trustee appointed by that agreement all right to call for such accounting and have limited the power of the trustee as follows:

"and that upon any default of said second party (Tarr & McComb, Incorporated) therein said Citizens National Bank (the trustee) on behalf of said first parties (appellants herein) and of said third parties (the creditors who are not joined herein) shall have and take such recourse against said second party for such default as might otherwise be had and taken by said first parties if this agreement were made and entered into between said first parties and said second party

only, provided always that in having and taking such recourse said bank shall act upon the direction of a majority amount of said creditors of said first parties * * *" [Tr. pp. 50, 51.]

The circumstances under which appellee obtained possession of the property are as follows:

Harris and Stevens Corporation, one of the appellants (plaintiffs below) was the owner of certain oil leases under which it had possession of the properties. [Tr. pp. 5, 6, 17, 24.]

While operating the properties Harris and Stevens Corporation made a contract with Tarr & McComb, Incorporated, appellee herein (defendant below), for the sale to the latter company of the entire output of oil from the properties. [Tr. pp. 6, 7, 33.]

Later, while operating under these leases and its said contract with Tarr & McComb, Incorporated, Harris and Stevens Corporation made assignments of the said leases to Tarr & McComb, Incorporated, for the purpose expressed as follows:

"This assignment is for the purpose of securing said Tarr & McComb, Incorporated, for all moneys now due from said Harris and Stevens Corporation to Tarr & McComb, Incorporated, or that may be hereafter advanced by said Tarr & McComb, Incorporated, to said Harris and Stevens Corporation or on their behalf, and further to secure any obligations or indebtedness that may hereafter be incurred or accrue on account of said Harris and Stevens Corporation to Tarr & McComb, Incorporated." [Tr. p. 39, 2nd par., and p. 43, 2nd par.]

With regard to possession of the physical properties, each of said assignments provided that Harris and Stevens Corporation continue operations under the leases according to the terms and conditions thereof, and further as follows:

"* * * or upon default in any of its indebtedness or obligations now or hereafter accruing or incurred by or on behalf of said company to Tarr & McComb, Incorporated, will upon demand in writing surrender possession of the premises to Tarr & McComb, Incorporated * * *" [Tr. p. 40 and pp. 43, 44.]

A number of months later appellants had become so financially involved that it became necessary to make some settlement with their creditors. Accordingly a creditors' agreement was signed by all except three creditors with claims aggregating $3,000. [Tr. pp. 7, 11.]

The creditors' agreement, referred to in the complaint as "Exhibit F" [Tr. pp. 7, 46], recites that Tarr & McComb, Incorporated, are creditors of Harris and Stevens Corporation in an amount $..... [Tr. pp. 47, 54.]

The complaint alleges that appellants had become indebted for about $40,000. "That all of said indebtedness was then due and payable." [Tr. p. 7.]

It thus appears that the indebtedness to Tarr & McComb, Incorporated, was in default, and that it was entitled to a surrender of possession of the premises to it under its assignments of the leases.

Three creditors with $3,000 worth of claims were refusing to sign the creditors' agreement.

The complaint states these three creditors had

"refused to sign and become parties to said agreement of March 12, 1917, and said creditors so refusing to sign and become parties to said agreement as aforesaid threatened that they would commence suits and actions against your orators for the recovery of their several claims, and would cause writs of attachment to be issued and levied against the hereinabove described tracts of real property, and both thereof, and the interests of your orators and the defendant therein." [Tr. p. 11.]

Under these circumstances possession was surrendered to Tarr & McComb, under their assignments of leases.

The complaint further alleges that at the time of surrender of possession,

"* * * Harris and Stevens Corporation was not possessed of any other property, * * * [Tr. p. 13.]

As a condition and as a result of the change of possession, the three outstanding creditors signed up the creditors' agreement.

With Tarr & McComb, Incorporated, in possession of the properties, the creditors' agreement was finally signed up and put in operation.

Furthermore, as the complaint alleges:

"* * * defendant has from time to time rendered to the said The Citizens National Bank of Los Angeles statements showing receipts and expenditures from the operation of said properties and has paid to said The Citizens National Bank of Los Angeles, for the benefit of all the said creditors of your orators, certain sums

of money to be by said bank disbursed to said creditors in partial payment of their respective claims, and the said The Citizens National Bank of Los Angeles has paid said sums of money so received by it from defendant as aforesaid to said creditors, who have received and receipted for the same." [Tr. pp. 12, 13.]

The creditors' agreement provided for extensions of time for payment of creditors every six months if $6,000 has been paid each period, thus allowing several years to work out the agreement [Tr. pp. 51, 52], and pay the $40,000 due with interest. [Tr. p. 7.] This suit was filed July 16, 1917, before the expiration of the first six months' period.

The creditors presumably have only been paid a small portion of the amounts due them.

The arrangement under which the agreement was finally signed, put in operation and a dividend paid, should not be disturbed, at least not until the creditors are paid in full.

Summary.

The owners of certain oil leases contracted to sell the entire production to another party. To secure its obligations and indebtedness contracted to such party the owners of the leases assigned same as security but retained possession of the leased properties until default.

Being on the verge of bankruptcy and in default to the assignee of the leases and having made an unsuccessful attempt to get a creditors' agreement signed up, possession was surrendered under said assignment of the leases.

The assignee in possession who had signed the creditors' agreement continues with the arrangement and obtains the outstanding creditors on the creditors' agreement.

All the creditors being signed up, operations were commenced and a dividend paid.

There is no allegation in the complaint giving any reason for disturbing the existing arrangement. There is no allegation, nor any inference, in the complaint indicating any agreement on the part of Tarr & McComb, Incorporated, that after the three creditors had signed it would return possession of the premises to Harris and Stevens Corporation. There is no allegation in the complaint that the three creditors who had signed the creditors' agreement after Tarr & McComb, Incorporated, had come into possession would be willing that Harris and Stevens Corporation should resume possession. There is no allegation in the complaint of any kind that there was any agreement for return of possession to Harris and Stevens Corporation after its surrender thereof to Tarr & McComb, Incorporated, certainly not until all the creditors had been paid in full.

ARGUMENT.

I.

The Surrender of Possession Was a Consideration for Outstanding Creditors to Join in the Creditors' Agreement if After Change of Possession They Joined Willingly. If So, the Creditors Are Indispensable Parties Defendant in a Suit to Revest Possession and This Action Must Fail for Lack of the Necessary Diversity of Citizenship and Because No Cause of Action Stated.

When the possession in controversy was surrendered to defendant Tarr & McComb, Incorporated, three of appellants' creditors with claims aggregating three thousand dollars had refused to join in the creditors' agreement of March 12, 1917, and were threatening attachments.

After the change of possession, these creditors signed the creditors' agreement, operations were prosecuted thereunder and dividends paid.

These creditors joined either willingly or unwillingly on account of the change of possession.

If they joined willingly the consideration for their joining was because Tarr & McComb, Incorporated, had come into possession in place of the failing debtor.

Tarr & McComb, Incorporated, had the most to gain from the effective and expeditious operation of the properties until the creditors were paid in full. They were not only creditors, and, as such, entitled to receive a creditor's dividends from the operation of the prop-

erties, but were also entitled to a seller's commission of 22½ cents per barrel [Tr. p. 48], and also, after the creditors were paid, would obtain an extension of their contract for the entire production of the properties without litigation with the creditors. [Tr. p. 47.]

It might well be that the surrender by the failing debtor of the possession of these properties to a creditor vitally interested in making them productive would be a consideration for these three outstanding creditors to sign the creditors' agreement.

If these three creditors after the change of possession signed *willingly* the creditors' agreement which they had refused to sign before the change of possession, the only inference to be drawn is that the change of possession was the consideration for their signing.

If the change of possession was the consideration for the signatures of these three creditors to the creditors' agreement, then they or their trustee are indispensable parties defendant in this action to revest the possession in plaintiff, Harris and Stevens Corporation.

If that be the case, the first ground of defendant's motion to dismiss was properly sustained, to-wit: because certain indispensable parties defendant are of the same citizenship as the plaintiff and therefore no diversity of citizenship exists.

In the case of *South Penn Oil Co. v. Miller* (4th Circuit), 175 Fed. 729, 736, the court said:

> "We also think the record discloses the fact that parties absolutely essential to the proper disposition of the questions decided by the court below were not before it, and that consequently, even

> had the subject-matter of the controversy been properly within its jurisdiction, the court could not have effectively disposed of it. Neither the lessors of the complainants, nor of the defendant, were made parties to the suit, and yet the final decree disposed of the funds in which they were interested, and decided the title to the property which they claim to own in fee simple."

Moreover, if the transfer of possession was the consideration for the outstanding creditors joining, it would be inequitable to revest the possession without their consent.

Appellants say (their brief, pp. 5 and 21) that there was no consideration for the transfer. There was. The pre-existing indebtedness due Tarr & McComb, Incorporated, the joining in the creditors' agreement, the holding for the benefit of the creditors, any one was sufficient consideration for the surrender of possession.

II.

If the Change of Possession Coerced the Outstanding Creditors Into Signing That Which They Otherwise Would Not Have Signed. If It Hindered and Delayed Them in the Collection of Their Debts, It Was a Fraud Upon Them and Debtor May Not Recover Such Possession.

If the creditors outstanding at the time that Harris and Stevens Corporation surrendered possession to Tarr & McComb, Incorporated, thereupon joined in the creditors' agreement, but joined unwillingly, if

they were coerced into joining by the change of possession, then the transfer was fraudulent in law in that it hindered and delayed them by preventing their levying attachments on the only property plaintiffs had, but which it is alleged in the complaint is worth $50,000, amply sufficient to satisfy a $3,000 indebtedness.

In *Dent v. Ferguson,* 132 U. S. 50, 33 L. Ed. 245, 246, 247, the court said:

Page 245:

> "What were the circumstances under which this instrument was executed? A. M. Ferguson was then possessed of a large estate in Memphis, consisting of valuable city lots with improvements, all estimated by competent witnesses to be worth $100,000, more or less. At the time he was indebted to various persons in sums which, we believe, it is admitted amounted to as much as the value of his property. * * *"

Page 246:

> "* * * The instrument itself was executed under circumstances which would lead a court to presume fraud upon creditors. It was a conveyance by a person deeply indebted, in anticipation of decrees and judgments, which, added to the existing incumbrances, amounted to the value of his property. * * *"

Page 247:

> "* * * A court of equity will not intervene to give relief to either party from the consequences of such agreement. The maxim, *'in pari delicte potior est conditio defendentis'* must prevail. * * *"

In II *Warvelle on Vendors* (2nd ed.), p. 730, the learned author states:

> "The effect of a fraudulent deed is to bind not only the grantor, but his heirs, privies and assigns, all, in fact, who claim by, through or under him.
>
> "To the general statements above made, and which constitute the universally recognized rule of law upon this subject, the writer has been able to find but one dissenting decision. This decision, while not denying the existence or merit of the general rule as stated, yet holds that when a party who has transferred his property with intent to delay or defraud creditors abandons his fraudulent purpose, and apprising the other party thereof seeks to reinstate himself in the possession of his lands, in order that he may apply them to the claims of his creditors, he may do so; and that the other party, who has been a participant in the fraudulent transaction, cannot hold the property and thus prevent it from being devoted to its legitimate uses."

The case of Carll v. Emery, 148 Mass. 32, mentioned in the above quotation as contrary to the generally accepted doctrine, is the case occupying page 17 of appellant's brief. But even if it were good law it is not applicable to this case, where the assignee in possession is and has been devoting the proceeds derived therefrom to the payment of the creditors, all of whom have come in under the creditors' agreement.

Appellants suggest (p. 13 brief) that by reason of some duress of appellee they were compelled to surrender possession and hence are not in *pari delicto*. No duress is alleged in the complaint, nor can any be

inferred from any of the facts stated in the complaint. The only duress mentioned in the brief is of the three creditors who had refused to join in the agreement. Their actions or influence are not imputable to appellee.

We agree with appellants' statement (brief p. 19),

"If the act of surrender of possession of the property herein was fraudulent, it is now purged of fraud."

The transaction is now valid. It should stand and not be set aside.

20 Cyc. 416;
Bigelow on Fraudulent Conveyances, p. 482.

A dividend having been paid the creditors under the assignment, they, who are the only ones entitled to avoid the same, have ratified and confirmed it. The transaction is purged of fraud so as to allow it to stand, not so that the fraudulent grantor can obtain a reconveyance.

III.

The Change of Possession Inures to the Benefit of the Creditors and Is Not Contrary to Any Agreement or Provision Contained in the Creditors' Agreement, But Is Consistent Therewith.

Appellants state in their brief on page 20 that unless they secured relief in equity the very object sought to be accomplished by the creditors' agreement will be defeated; that the creditors who signed became parties to the creditors' agreement "upon a misrepresentation of fact, the representation in the creditors' agreement

being that the appellants should have possession of and operate the property." There is no representation in the creditors' agreement to this effect. Counsel cannot find anything which even hints at Harris and Stevens Corporation retaining possession of the property; in fact, the creditors' agreement provided that the assignments of the leases

"* * * shall be and remain in full force and effect, upon the express understanding between all parties hereto that said assignments shall inure to the benefit of all of said creditors."

The purpose of keeping the assignments in full force and effect was to protect the creditors, and contemplated that there might be a change of possession as provided in the assignments. It can make no difference in the case that the change in possession took place before any operations rather than after debtor might have continued to operate and failed.

Conclusion.

The motion to dismiss the complaint of the plaintiffs in the District Court was properly sustained because,—

1. The complaint disclosed the fact that the contract of March 12, 1917, between the Harris and Stevens Corporation, Tarr & McComb and the Citizens National Bank of Los Angeles, and certain creditors of Harris and Stevens Corporation was not executed by three of the creditors of the said corporation. The effect of the contract, therefore, was manifestly to hinder, delay and defraud certain creditors of Harris

and Stevens Corporation who did not sign that agreement.

In accordance with the case of *Dent v. Ferguson,* 132 U. S. 50, 62, it was an agreement to hinder, delay and defraud creditors, and certainly under those circumstances, the plaintiffs being *in pari delicto,* could not recover back the property which they had proposed by that agreement to assign and transfer to the defendants.

2. If, however, all the creditors of the plaintiffs finally signed this agreement and made it valid as between creditors and plaintiff, it is a fair inference from the allegations of the complaint that the creditors all came into the agreement because the property was to be transferred to a third person to be held in trust until the claims of the creditors of the plaintiffs were satisfied. If this condition prevailed, certainly the Citizens National Bank, which acted as trustee of the funds, and the creditors who came into this agreement, are necessary parties to the suit. They are not only necessary, but absolutely indispensable. To turn the property back to the plaintiffs upon the first payment of a dividend of the claims of the creditors, without the claims being paid in full, would be to take away from the creditors and their trustee a substantial right, and would itself be a fraud on them. It is conceded by the plaintiffs in their complaint that if these creditors were made parties to the complaint it would oust the court of jurisdiction. The inducement to their becoming parties to the complaint was that

the plaintiffs, not being able to manage their own property and pay their debts, should turn it over to some one else, in trust, until the debts were paid. An assignment for the benefit of creditors is not illegal at common law.

3. There is no agreement alleged that when any portion of the indebtedness is paid the property is to be turned back to the plaintiffs. There was no agreement made in reference to its being turned back at all. If in equity it should be held that the object of this agreement was to make provision for the payment of the debts of the plaintiff, and that when the debts were paid a court of equity would decree that the property should be turned back to the plaintiffs, anything less than the full payment of the indebtedness would not entitle the plaintiffs to recover the property. In the absence of any agreement that the property should be turned back to the plaintiffs prior to the payment of every dollar of their indebtedness, there is no equity in their favor and no right on their part to at the present time insist upon the property being turned back to them. Therein the complaint is absolutely without equity. Counsel for appellants cannot point out a single provision that is made in any of these contracts for the turning back of the property to the appellants, and equity will not decree that it be turned back until all the conditions of the agreement entered into by all of the creditors of said plaintiffs are accomplished. Until that agreement is accomplished the possession of the defendants gives it no advantage, unlawful or otherwise, over plaintiff or other creditors. Counsel

claim in their brief on behalf of appellants that after the other creditors shall have been paid in full, appellee will have an advantage in being still possessed of the property. The answer to this is, that time has not yet come.

It cannot be said there is no consideration for this agreement of March 12th, or the one entered into by all the creditors of appellants, for an assignment for the benefit of creditors is itself a sufficient consideration.

4. If it should be claimed that the defendants had been guilty of any breach of trust in this matter it will demonstrate the necessity of having the Citizens National Bank and all the creditors of said plaintiffs made parties to this proceeding. Beyond peradventure, in such a case, the creditors of the bankrupt and said bank are indispensable parties to the suit, and while parties which are merely necessary parties will not oust the court of jurisdiction, parties who are indispensable and there is no longer diverse citizenship will oust the court of all jurisdiction whatsoever.

For these reasons the District Court committed no error in sustaining the motion to dismiss plaintiffs' complaint. Certainly the bill of complaint is without equity.

Respectfully submitted,

CHARLES C. MONTGOMERY,
Attorney for Defendant and Appellee.

LYNN HELM,
Of Counsel.

No. 3102

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL CARBON COMPANY, a Corporation,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc.,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

Messrs. HARRINGTON, BIGHAM & ENGLAR, 64 Wall Street, New York City, Messrs. REVELLE & REVELLE, 605 New York Building, Seattle, Washington,

Proctors for Appellant.

Messrs. FARRELL, KANE & STRATTON, 1011 American Bank Building, Seattle, Washington, Messrs. BOGLE, GRAVES, MERRITT & BOGLE, 610 Central Building, Seattle, Washington, Messrs. PLATT & PLATT, Platt Building, Portland, Oregon,

Proctors for Appellee. [1*]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 2049.

NATIONAL CARBON COMPANY, a Corporation,

Libellant,

vs.

Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc.,

Respondents,

and

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare and certify to constitute the record on appeal in the above-entitled cause, the following pleadings, papers, records, documents, etc., on file in your office, which record or transcript is to be certified and forwarded to and filed in the Circuit Court of Appeals for the 9th Circuit at San Francisco, California, there to be printed or otherwise dealth with as the stipulation of proctors herein, the orders of the Court or the rules of the said Circuit Court of Appeals may require.

1. The libel.
2. This praecipe.
3. Stipulation of costs.
4. Monition.
5. Praecipe for *alias* monition.
6. *Alias* monition.
7. Stipulation of claimant for costs.
8. Claim of ownership.
9. Bond for release.
10. Exception of claimant to libel.
11. Marshall's return of *alias* monition.
12. Amended exceptions of claimant to libel.
13. Note of exceptions for hearing.
14. Order overruling exceptions.
15. Answer of claimant Alaska Steamship Co.
16. Order extending time within which libellant may plead. [2]
17. Answer of libellant to interrogatories.
18. Memorandum decision.

19. Final decree.
20. Notice of appeal.
21. Assignment of errors.
22. Order allowing appeal.
23. Notice of filing bond on appeal.
24. The stipulations of proctors to send up the original depositions and original exhibits attached thereto, and any other original exhibits on file in your office as per the stipulation filed on Saturday, December 8th, 1917.
25. The order of the Court directing said original depositions and original exhibits to be sent up.
26. All testimony and other proof adduced in the cause including the original depositions and original exhibits attached thereto and any other original exhibits on file in said cause.
27. The stipulation of proctors and the order of Court extending the time within which apostle might be prepared and sent up to the Circuit Court of Appeals and the citation of the Court on file herein, and such other opinions of the Court wherein upon interlocutory question or finally deciding the cause and any and all other papers on file in your office necessary to the final determination of the action on appeal.

Omitting all captions and verifications excepting on the libel.

Dated this 10th day of December, A. D. 1917.

HARRINGTON BIGHAM & ENGLER,
By REVELLE & REVELLE,
G. H. REVELLE,
Proctors for Libellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 10, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[3]**

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 2049.

NATIONAL CARBON COMPANY, a Corporation,
Libellant,

vs.

Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc.,
Respondent,

And

ALASKA STEAMSHIP COMPANY, a Corporation,
Claimant.

Statement Under Admiralty Rule No. 4.

The National Carbon Company, libellant above named, commenced an action against the Steamship "Eureka," her engines, boilers, tackle, apparel, furniture, etc., on the 8th day of July, 1916, by filing its

libel and stipulation for costs in the above-entitled court on said date. The correct title of said cause being "National Carbon Company, a corporation, Libellant, vs. Steamship "Eureka," her Engines, Boilers, Tackle, Apparel, Furniture, etc., and Alaska Steamship Company, a Corporation, Claimant."

The libel in said cause was filed on the 8th day of July, 1916, in the above-entitled court; on the 26th day of July, 1916, a monition was issued in said cause, returnable on August 16th, 1916.

That on August 16th, 1916, exceptions of the Alaska Steamship Company, claimant, were filed in said cause; on the 23d [4] day of August, 1916, the amended exceptions of the Alaska Steamship Company were filed in said cause, which exceptions were noted for hearing for September 19th, 1916. On September 19th, 1916, the exceptions of the claimant were disallowed by the Court and claimant was given thirty days to answer. That on November 16th, 1916, the answer and interrogatories of the claimant Alaska Steamship Company were filed; that on the 31st day of July, 1916, the steamship "Eureka" was attached and the claimant prepared and filed a bond in the above-entitled cause as provided by law on the first day of August, 1916. That the trial of said cause was begun on the 10th day of July, 1917, before the Hon. E. E. Cushman, Judge of the District Court above named, and continued to the 11th day of July, 1917,—that on the 10th day of October, 1917, the Court handed down its memorandum decision and on the 15th day of October, 1917, signed and filed a final decree in said cause.

That on the 20th day of October, 1917, an order allowing appeal, notice of appeal, bond on appeal, and assignment of errors were filed in the above-entitled cause.

That on the 10th day of December, 1917, there was filed in the office of the clerk of the United States District Court, a stipulation of proctors for appellant and appellee and an order of the Judge of the United States District Court directing that the original depositions and original exhibits on file in said cause be sent up to the U. S. Circuit Court of Appeals to be used by said Court on the final hearing of the cause on appeal, and further providing that said original depositions and exhibits need not be printed as required by the rules of the Court.

HARRINGTON, BIGHAM & ENGLER,
By REVELLE & REVELLE,
G. H. REVELLE,
Proctors for Appellant. **[5]**

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 10, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[6]**

Libel.

To the Honorable the Judges of the District Court of the United States for the Western District of Washington:

The libel and complaint of National Carbon Company, a corporation, against the Steamship "Eureka," her engines, boilers, etc., in a cause of cargo

damage, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. Your libellant is a corporation, duly organized, created and existing under and by virtue of the laws of the State of New Jersey, with an office and place of business in the city of Cleveland, in the State of Ohio.

Second. The steamship "Eureka" is now or will be during the pendency of process hereunder, within the port of Tacoma and within the jurisdiction of this Honorable Court.

Third. On or about the 8th day of September, 1915, your libellant shipped and placed on board the steamship "Eureka," then lying at the port of New York, 116 barrels containing dry battery cells, in good order and condition, consigned to the libellant at San Francisco, California, to be safely carried by the said steamship "Eureka," as a common carrier, from the port of New York to the port of San Francisco, in the State of California, and there to be delivered in like good order and condition as when shipped in accordance with the valid terms of a bill of lading then and there issued for the said shipment, in consideration of an agreed freight, which was then and there prepaid by the said libellant for the carriage of the said cargo. [7]

Fourth. On or about the 14th day of September, 1915, libellant shipped and placed on board the steamship "Eureka" then lying at the port of Philadelphia, Pennsylvania, 12 boxes and 123 barrels containing dry batteries, in good order and condition, consigned to the libellant at San Francisco,

California, to be safely carried by the said steamship "Eureka," as a common carrier, to the port of San Francisco, and there to be delivered to the libellant, in like good order and condition, in accordance with the valid terms of a bill of lading then and there issued for the said shipment, in consideration of an agreed freight, which was then and there prepaid for the carriage of the said cargo.

Fifth. On or about the 16th day of September, 1915, libellant shipped and placed on board the steamship "Eureka," then lying at the port of Philadelphia, Pennsylvania, 124 barrels of batteries and 1 box of batteries (15 barrels short shipped, to follow on next steamer) in good order and condition, consigned to F. H. Murray, Los Angeles, California, to be safely carried by the said steamship "Eureka" as a common carrier to the port of San Pedro (Los Angeles) California, and there to be delivered to said F. H. Murray, agent of the libellant, in like good order and condition, in accordance with the valid terms of a bill of lading then and there issued for the said shipment, in consideration of an agreed freight, which was then and there prepaid for the carriage of the said cargo.

Sixth. Thereafter, the said steamship "Eureka" set sail from the port of Philadelphia, with the libellant's cargo aforesaid on board, bound for the ports of San Pedro (Los Angeles) and San Francisco, California, but the said steamship "Eureka" has never arrived at the ports of San Pedro (Los Angeles) or San Francisco [8] since she set out from New York and Philadelphia aforesaid, and has

wholly failed to perform the contracts of carriage above set forth and to deliver the cargo of this libellant in accordance with the terms of said bills of lading.

Seventh. On or about October 1st, 1915, your libellant heard that the Panama Canal was closed to navigation, and your libellant immediately inquired of the agents of the S. S. "Eureka" as to where she was at that time. The agents of the S. S. "Eureka" informed your libellant that the S. S. "Eureka" was detained because of the closing of the Canal, and was then at the port of Colon. Your libellant immediately notified the agents for the said steamship "Eureka" of the perishable character of the goods which your libellant had shipped on board the steamship "Eureka" as aforesaid, and your libellant offered to pay for the discharge of the said goods, and in addition to pay all costs which might be incurred by the way of restoring other cargo on the steamship "Eureka," which it might be necessary to move in order to discharge the cargo of your libellant, and demanded the delivery of its said goods at Colon. Notwithstanding the said offer of your libellant and the said notice of the perishable nature of the libellant's cargo and the said demand for delivery thereof to your libellant at Colon, those in charge of the steamship "Eureka" failed and refused to deliver said goods to your libellant. Thereupon your libellant repeatedly renewed the said request and demanded of those representing the said steamship "Eureka" that this cargo be delivered at once to your libellant at Colon, and again notified those

representing the said steamship that unless such a delivery was made the cargo would be a total loss because of its perishable nature. [9]

Eighth. Several weeks elapsed after the offers, requests and demands aforesaid were first made by your libellant, and, in the meantime, your libellant was in constant communication with those in charge of the said steamship "Eureka" renewing its offers, requests and demands, as aforesaid, from time to time, but those representing the said steamship still refused to make delivery of the said goods and nothing was done by those in charge of the said steamship "Eureka" until November 22d and 23d, when the said cargo was delivered to your libellant at New Orleans, Louisiana. It was then discovered that the said cargo was badly damaged, as a result of the failure of the said steamship to perform its contracts as aforesaid, and the failure of those in charge of her to deliver to the libellant the said goods when demand for delivery thereof was made as aforesaid.

Ninth. By reason of the premises your libellant has sustained damage in about the sum of Ten Thousand ($10,000) Dollars, as nearly as the same can now be ascertained, no part of which has been paid although duly demanded.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction, issue against the said steam-

ship "Eureka," her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your libellant its damages, with interest and costs, and that the said steamship "Eureka," her engines, **[10]** boilers, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

HARRINGTON, BIGHAM & ENGLAR,
No. 64 Wall Street,
New York City.
REVELLE, REVELLE & REVELLE,
No. 605 New York Building,
Seattle, Washington,
Proctors for Libellant.

State of Washington,
City of Seattle,
County of King,—ss.

G. H. Revelle, being duly sworn, deposes and says: That he is a member of the firm of Revelle, Revelle & Revelle, proctors for the libellant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief. The sources of deponent's information and the grounds of his belief are statements made to him by Messrs. Harrington, Bigham & Englar, Attorneys for the libellant in New York City.

That the reason why this verification is not made by the libellant, is because the libellant is a corpora-

tion of the State of New Jersey and none of its officers reside within this district.

G. H. REVELLE.

Sworn to before me this 6th day of July, 1916.

[Seal of Notary] TOM ALDERSON,

Notary Public in and for the State of Washington, Residing in Seattle. **[11]**

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 8, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[12]**

Stipulation of Libelant for Costs.

WHEREAS, a libel was filed in this court on the 8th day of July, 1916, by the National Carbon Company, a corporation, against the steamship "Eureka," her engines, boilers, etc., for the reasons and causes in the said libel mentioned and the said National Carbon Company, a corporation, libelant above-named, and the Royal Indemnity Company of New York, a corporation, regularly and duly incorporated under and by virtue of the laws of the State of New York and authorized to do business under the laws of the State of Washington, in the said State of Washington, surety for the said libellant, hereby consenting that in case of default or contumacy on the part of libellant, execution for the sum of Two Hundred and Fifty ($250.00) Dollars may issue against the parties hereto, their goods, chattels and lands,

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED for the benefit of whom it may concern that the stipulators, the undersigned, are and each of them is hereby bound in the sum of Two Hundred and Fifty ($250.00) Dollars, conditioned that the libellant above named shall pay all costs and expenses which shall be awarded against it by the final decree of this court or upon appeal by the Appellate Court.

[Corporate Seal]

NATIONAL CARBON COMPANY, a Corporation,

By G. H. REVELLE,

Its Attorney and Agent.

ROYAL INDEMNITY COMPANY OF NEW YORK, a Corporation,

By M. A. BAILEY,

Attorney in Fact.

By JOHN W. ROBERTS,

Attorney in Fact. [13]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 8, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [14]

Monition.

2049

Western District of Washington,—ss.

The President of the United States of America to the Marshal of the United States for

[Seal] the Western District of Washington, GREETING:

WHEREAS, a libel hath been filed in the United States District Court for the Western District of Washington, on the 8th day of July, in the year of our Lord one thousand nine hundred and sixteen, by National Carbon Company, a Corporation, Libellant, against Steamship "Eureka," her engines, etc., for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said S. S. "Eureka" or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said S. S. "Eureka," or vessel, her tackle, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said S. S. "Eureka," or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held at Tacoma, in and for the Southern Divison of the Western District of Washington, on the 26th day of July, A. D. 1916, at ten o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you

then and there make return thereof, together with this writ.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of said Court, at the city of Tacoma in the Southern Division of the Western District of Washington, this 8th day of July, in the year of our Lord one thousand nine hundred and sixteen, and of our independence the one hundred and forty-first.

FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk.

HARRINGTON, BIGHAM & ENGLAR,
64 Wall St., New York City.
and
REVELLE, REVELLE & REVELLE,
605 New York Block,
Seattle, Wash.,
Proctors for Libellant. [15]

Western District of Washington,—ss.

I hereby certify and return, that on the 8th day of July, 1916, I received the within Monition and that after diligent search, I am unable to find the within named defendants S. S. "Eureka," within my district.

JOHN M. BOYLE,
United States Marshal.
By FRANK ALBERT, Jr.,
Deputy United States Marshal.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 26, 1916.

Frank L. Crosby, Clerk. By. F. M. Harshberger, Deputy. [16]

United States District Court for the Western District of Washington.

No. 2049.

NATIONAL CARBON COMPANY, a Corporation, Libellant,

vs.

S. S. "EUREKA," etc.

Praecipe for Alias Monition.

To the Clerk of the Above-entitled Court:

You will please issue *alias* monition in above case and deliver to marshal for service.

REVELLE & REVELLE,
Proctors. [17]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 26, 1916. Frank L. Crosby, Clerk. By. F. M. Harshberger, Deputy. [18]

Alias Monition.

2049

Western District of Washington,—ss.

The President of the United States of America to the Marshal of the United States for the Western District of Washington, Greeting:

[Seal]

WHEREAS, a libel hath been filed in the United States District Court for the Western District of

Washington, on the 8th day of July, in the year of our Lord one thousand nine hundred and sixteen, by National Carbon Company, a Corporation, Libellant, against the steamship "Eureka," her engines, boilers, etc., for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said steamship "Eureka," or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said steamship "Eureka," or vessel, her tackle, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said steamship "Eureka," or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held at Tacoma, in and for the Southern Division of the Western District of Washington, on the sixteenth (16th) day of August, A. D. 1916, at ten o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of said Court, at the city of Tacoma in the Southern Division of the Western District of Washington, this 26th day of July, in the year of our Lord one thousand nine hundred and sixteen, and of our independence the one hundred and forty-first.

FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy Clerk.

HARRINGTON, BIGHAM & ENGLAR,
64 Wall St., New York City,
and
REVELLE, REVELLE & REVELLE,
605 New York Block,
Seattle, Wash.,
Proctors for Libellant. [19]

Office of U. S. Marshal,
Western District of Washington,—ss.

In obedience to the within Monition, I attached the steamship "Eureka," her tackle, etc., therein described, on the 31st day of July, 1916, and have given due notice to all persons claiming the same that this Court will, on the 16th day of August, 1916, (if that day should be a day of Jurisdiction, if not, on the next day of Jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. And that on the 2d day of August, 1916, I released the said vessel upon receiving a notice of bonding signed by the Clerk of the U. S. District Court.

Date, August 2d, 1916.

JOHN M. BOYLE,
U. S. Marshal.
By John T. Secrist,
Deputy Marshal.

MARSHAL'S FEES AND EXPENSES:

For Serving Attachment and Monition.....	2.00
Miles traveled, 4, at 6 cents per mile.....	.24
Preparing Notice of Seizure for posting....	
Preparing Copy of Notice of Seizure for Publisher	
Publishing Notice of Seizure.....	
Posting Notice of Seizure.....	
Percentage on $..... at ..... per cent...	
Keeper's Fees 3 day at $2.50 per day.....	7.50
Releasing Vessel	.50
Total.....	$10.24

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 21, 1916. Frank L. Crobsy, Clerk. By F. M. Harshberger, Deputy. [20]

Bond for Costs.

KNOW ALL MEN BY THESE PRESENTS: That we, Alaska Steamship Company, a corporation, as Principal, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to transact business in the State of Washington, as Surety, are held and firmly

bound unto the United States of America, for the use of all persons who may be interested in the premises, in the sum of Two Hundred and Fifty Dollars ($250.00), for which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents.

SIGNED, SEALED AND DATED at Seattle, Washington, this 1st day of August, 1916.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the said Alaska Steamship Company, claimant in the above-entitled action instituted in said Court by National Carbon Company, a corporation, against said steamship "Eureka," her engines, boilers, tackle, apparel, furniture, etc., shall pay all costs which by the decree granted or practice of this Court it shall become liable to pay then this obligation shall be void; otherwise, to remain in full force and virtue.

ALASKA STEAMSHIP COMPANY,
By BOGLE, GRAVES, MERRITT & BOGLE, Its Proctors,
Principal,
AMERICAN SURETY COMPANY OF NEW YORK,
[Corporation Seal] By S. H. MELROSE,
Resident Vice-President. [21]
E. G. GHOLSON,
Resident Assistant Secretary.

(Two cent Rev. stamp.)
(One-half cent Rev. stamp.)

Signed, sealed and delivered before me this 1st day of August, 1916.

[Seal of Notary] TOM ALDERSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety this 1st day of August, 1916.

[Seal of Collector of Customs]
W. A. FAIRWEATHER,
Deputy Collector of Customs.

O. K.—REVELLE, REVELLE & REVELLE,
Proctors for Libelant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 1, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [22]

Claim of Alaska Steamship Co. of Ownership of SS. "Eureka" etc.

To the Honorable Judges of the United States District Court for the Western District of Washington, Southern Division:

Comes now Alaska Steamship Company, a corporation, intervening for itself as owner of the steamship "Eureka," her engines, boilers, tackle, apparel, furniture, etc., and makes claim to the said steamship "Eureka," her engines, boilers, tackle, apparel, furniture, etc., as the same are attached by the Marshal under process of this Court, at the instance of the National Carbon Company, a corporation; and

the said Alaska Steamship Company avers that it was in possession of the said steamship at the time of the attachment thereof, and that it was and is the true and *bona fide* owner of the said steamship.

WHEREFORE, it prays to be permitted to defend accordingly.

Dated at Seattle, Washington, this 1st day of August, A. D. 1916.

ALASKA STEAMSHIP COMPANY,
Claimant.

FARRELL, KANE & STRATTON and
BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Claimant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 1, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [23]

Bond to Release.

KNOW ALL MEN BY THESE PRESENTS, That we, Alaska Steamship Company, a corporation, as principal, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of New York and authorized to transact business in the State of Washington, as surety, are held and firmly bound unto John M. Boyle, Marshal of the United States for the Western District of Washington, in the sum of Fifteen Thousand Dollars ($15,000), for the payment of which sum, well and truly to be made, we bind ourselves, and our successors, jointly and severally, firmly by these presents.

Signed, sealed and dated this 1st day of August, A. D. 1916.

WHEREAS, a libel has been filed in the District Court of the United States, for the Western District of Washington, Southern Division, on the 31st day of July, 1916, by the said National Carbon Company, against the steamship "Eureka," her engines, boilers, tackle, apparel, furniture, etc., on which process of attachment has issued, and the ship is in the custody of the said Marshal under such attachment; and the said Alaska Steamship Company has applied for the discharge of said vessel from the custody of said Marshal, and has filed a bond for claimant's costs, pursuant to the rules of practice of said Court:

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the said Alaska Steamship Company shall abide by and pay all the money awarded by the final decree rendered in said Court in said cause, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

ALASKA STEAMSHIP COMPANY,
By BOGLE, GRAVES, MERRITT & BOGLE,
Its Proctors,
Principal. [24]

[Corporate Seal]
AMERICAN SURETY COMPANY OF NEW YORK.
By S. H. MELROSE,
Resident Vice-President.
E. G. GHOLSON,
Resident Assistant Secretary.

(Three Twenty-five Cent Rev. Stamps.)

Signed, sealed and delivered before me this 1st day of August, 1916.

[Seal of Notary] TOM ALDERSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety this 1st day of August, 1916.

[Seal of Collector of Customs.]

W. A. FAIRWEATHER,
Deputy Collector of Customs.

O. K.—REVELLE & REVELLE,
Proctors for Libelant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 1, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [25]

Exception of Alaska Steamship Company, Claimant.

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, Southern Division:

Comes now Alaska Steamship Company, a corporation, claimant herein and excepts to the libel of National Carbon Company, a corporation, the libellant herein, on the ground that the libel is defective and insufficient. As a basis for said exception this claimant alleges:

First. In Article Third thereof the libellant has alleged that it shipped cargo on the steamship

"Eureka" at the port of New York consigned to the libellant at San Francisco, California, and in Article Fourth has alleged that it shipped cargo on the steamship "Eureka" at the port of Philadelphia consigned to the libellant at San Francisco, California, and in Article Fifth has alleged that it shipped cargo on the steamship "Eureka" at the port of Philadelphia consigned to F. H. Murray at Los Angeles, California.

Second. In Article Seventh the libellant has alleged that the libellant demanded delivery at Colon of all three of said shipments and that delivery to libellant was refused.

Third. In Article Eighth the libellant has alleged that all of said shipments were delivered to libellant at New Orleans, Louisiana, and that it was then discovered that said cargo was badly damaged as a result of the failure of said steamship to perform its contract and the failure of those in charge of the steamship to deliver to the libellant said goods when demand for delivery thereof was made.

Fourth. In Article Ninth the libellant has alleged [26] that by reason thereof the libellant has sustained damage in about the sum of Ten Thousand dollars ($10,000).

Fifth. So far as is shown in the libel the libellant had no right to demand delivery of the shipment consigned to F. H. Murray at Los Angeles, California, in that said shipment was consigned to said F. H. Murray and not to the libellant.

Sixth. That the libellant has not alleged what damage, if any, resulted from the alleged failure to

deliver to it at San Francisco, California, the two shipments consigned to it at San Francisco, California, in accordance with the terms of the bills of lading, or at Colon in accordance with the alleged demand, and libellant has further failed to allege what damage, if any, was caused to the shipment consigned to said F. H. Murray, at Los Angeles, California, by reason of the alleged failure to deliver said shipment at Los Angeles, California, in accordance with the terms of the bill of lading, or at Colon in accordance with said alleged demand.

Seventh. Libellant has alleged that it has suffered damage in the sum of Ten Thousand Dollars ($10,000) by reason of the failure to deliver all three of said shipments in accordance with the terms of the respective bills of lading, or in accordance with the libellant's alleged demand to deliver all of said shipments at Colon.

Eighth. It appears from the face of the libel that libellant was not entitled to demand delivery to it at Colon of the shipment consigned to F. H. Murray at Los Angeles, California, and is not entitled to recover for damages alleged to have resulted from such refusal.

Ninth. Libellant has failed to segregate the damage, if any, that accrued to the said shipment consigned to [27] F. H. Murray at Los Angeles, California, and the damage, if any, that accrued to the two shipments consigned to it at San Francisco, California.

PLATT & PLATT,

Proctors for Alaska Steamship Company, Claimant.

United States of America,
District of Washington,—ss.

Due service of the within exception of claimant, by certified copy thereof, as required by law, is hereby acknowledged at Seattle, Washington, this 15th day of August, 1916.

REVELLE & REVELLE,
Of Proctors for Libellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 16, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [28]

Amended Exceptions of Alaska Steamship Company, Claimant.

To the Honorable the Judges of the District Court of the United States, for the Western District of Washington, Southern Division:

COMES NOW Alaska Steamship Company, a corporation, claimant herein, and excepts to the libel of National Carbon Company, a corporation, the the libellant herein, on the ground that the libel is defective and insufficient. As a basis for said exception, this claimant alleges:

First. In Article Third thereof, the libellant has alleged that it shipped cargo on the steamship "Eureka" at the port of New York consigned to the libellant at San Francisco, California, and in Article Fourth has alleged that it shipped cargo on the steamship "Eureka" at the port of Philadelphia

consigned to the libellant at San Francisco, California, and in Article Fifth has alleged that it shipped cargo on the steamship "Eureka" at the port of Philadelphia consigned to F. H. Murray, at Los Angeles, California.

Second. In Article Seventh, the libellant has alleged that the libellant demanded delivery at Colon of all three of said shipments and that delivery to libellant was refused.

Third. In Article Eighth, the libellant has alleged that all of said shipments were delivered to libellant at New Orleans, Louisiana, and that it was then discovered that said cargo was badly damaged as a result of the failure of said steamship to perform its contract and the failure of those in charge of the steamship to deliver to the libellant [29] said goods when demand for delivery thereof was made.

Fourth. In Article Ninth, the libellant has alleged that by reason thereof the libellant has sustained damage in about the sum of Ten Thousand Dollars ($10,000).

Fifth. So far as is shown in the libel the libellant had no right to demand delivery of the shipment consigned to F. H. Murray, at Los Angeles, California, in that said shipment was consigned to said F. H. Murray and not to libellant.

Sixth. That the libellant has not alleged what damage, if any, resulted from the alleged failure to deliver to it at San Francisco, California, the two shipments consigned to it at San Francisco, California, in accordance with the terms of the bills of lad-

ing, or at Colon, in accordance with the alleged demand, and libellant has further failed to allege what damage, if any, was caused to the shipment consigned to said F. H. Murray, at Los Angeles, California, by reason of the alleged failure to deliver said shipment at Los Angeles, California, in accordance with the terms of the bill of lading, or at Colon in accordance with said alleged demand.

Seventh. Libellant has alleged that it has suffered damage in the sum of ten thousand dollars ($10,000) by reason of the failure to deliver all three of said shipments in accordance with the terms of the respective bills of lading, or in accordance with the libelant's alleged demand to deliver all of said shipments at Colon.

Eighth. It appears from the face of the libel that libelant was not entitled to demand delivery to it at Colon of the shipment consigned to F. H. Murray, at Los Angeles, California, and is not entitled to recover for damages alleged to have resulted from such refusal. [30]

Ninth. Libellant has failed to segregate the damage, if any, that accrued to the said shipment consigned to F. H. Murray, at Los Angeles, California, and the damage, if any, that accrued to the two shipments consigned to it at San Francisco, California.

Tenth. Libellant has alleged in Article Seventh of its libel that while the said steamship "Eureka" was at the port of Colon, it demanded the delivery to it at said port of the cargo shipped by libellant on said steamship, and said demand was refused, and that thereupon said libelant repeatedly renewed

the said request and demanded of those representing the said steamship "Eureka" that the cargo be delivered at once to the libellant, and again notified those representing the said steamship that unless such a delivery was made the cargo would be a total loss because of its perishable nature.

Eleventh. Libellant has alleged in Article Eighth of its libel that the said cargo was badly damaged, as a result of the failure of the said steamship to perform its contracts as aforesaid, and the failure of those in charge of her to deliver to the libellant the said goods when demand for delivery thereof was made as aforesaid.

Twelfth. Libellant has failed to set forth in its libel in what particulars, if any, the said goods so alleged to be damaged were damaged, and by what, if anything, said damage was caused.

PLATT & PLATT,

Proctors for Alaska Steamship Company, Claimant.

Address: 605 Platt Building, Portland, Oregon.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 23, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [31]

United States of America,
Western District of Washington,
Southern Division,—ss.

Due service of the within amended exceptions of claimant, by certified copy thereof, as rendered by

law, is hereby acknowledged at Seattle, Washington, this August 22, 1916.

REVELLE & REVELLE,
Of Proctors for Libelant. [32]

Note of Exceptions for Hearing.

To Platt & Platt, Attorneys for the Alaska Steamship Company, a Corporation, Claimant, and to the Alaska Steamship Company, Claimant:

You are hereby notified that the exceptions of the Alaska Steamship Company, a corporation, claimant, and the amended exceptions of the Alaska Steamship Company, claimant, will come on for hearing before the above-entitled court at Tacoma, Washington, on the 19th day of September, 1916.

You will therefore govern yourself accordingly.

REVELLE & REVELLE,
Proctors for Libellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Sep. 13, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [33]

Minutes of Court—September 19, 1916—Order Overruling Exceptions to Libel, etc.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 19th day of September, 1916, the Honorable Jeremiah Neterer, United States District Judge, presiding, among

other proceedings had, were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 2049.

NATIONAL CARBON CO.

vs.

S. S. "EUREKA," etc.

It is now ordered that the exceptions to the libel herein be and the same are hereby overruled and claimant is allowed 30 days to answer. **[34]**

Answer of Claimant Alaska Steamship Company.

To the Honorable Judges of the District Court of the United States for the Western District of Washington, Southern Division:

The answer of Alaska Steamship Company, a corporation, of the State of Nevada, claimant, to the libel and complaint of National Carbon Company, a corporation, against the steamship "Eureka," her engines, boilers, etc., in a cause of cargo damage civil and maritime, alleges:

First. That the allegations of the First Article of the libel are true.

Second. That the allegations of the Second Article of the libel are true.

Third. That part of the allegations of the Third Article of the libel are true; that it is true that on or about the 8th day of September, 1915, the libellant shipped and placed on board the steamship

"Eureka," then lying at the port of New York, certain barrels containing dry battery cells consigned to the libellant at San Francisco, California, to be safely carried by said steamship "Eureka," in accordance with the valid terms of the bill of lading then and there issued for the said shipment in consideration of an agreed freight which was then and there paid by the said libellant for the carriage of the said cargo.

That claimant has no knowledge or information sufficient to form a belief as to the truth of the allegations that libellant shipped 116 barrels of dry battery cells and that they were shipped in good order and condition, and claimant calls upon libelant to prove these facts. [35]

That claimant further answering the Third Article of the libel alleges that it is, and at all times herein mentioned has been, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Nevada, with its principal office and place of business at Seattle, Washington; that it is now the owner of the said steamship "Eureka," but that on September 8th, 1915, said steamship "Eureka" was owned by the Pacific Coast Steamship Company, a corporation, which had chartered said steamship to Crossett Western Lumber Company, a corporation; that said Crossett Western Lumber Company had sub-chartered said steamship to H. M. Williams & Co., Inc., a corporation, which in turn sub-chartered said steamship to Oregon-California Shipping Co., Inc., a corporation; that on September 8th, 1915, said

steamship was being loaded at the port of New York by said Oregon-California Shipping Co., Inc., under said sub-charter, and the shipment which libellant has alleged was made on said steamship on or about September 8th, 1915, was delivered to said Oregon-California Shipping Company, Inc., for carriage to San Francisco, via the Panama Canal, and said Oregon-California Shipping Co., Inc., issued to libellant its bill of lading covering said shipment and prescribing the terms of carriage, and libellant paid to said Oregon-California Shipping Co., Inc., in advance, the freight for the carriage of said shipment.

Fourth. That it is true as alleged in the Fourth Article of the libel that on or about the 14th day of September, 1915, libellant shipped on board the steamship "Eureka," then lying at the port of Philadelphia, Pennsylvania, certain boxes and barrels containing dry batteries consigned to the libellant at San Francisco, California, to be safely carried by the said steamship "Eureka" in accordance with the valid terms of the bill of lading then and there issued for said shipment in consideration of an agreed freight which was then and there prepaid for the carriage of the said cargo. [36]

That claimant has no knowledge or information sufficient to form a belief as to the truth of the allegations that libellant shipped 12 boxes and 123 barrels containing dry batteries, and that they were shipped in good order and condition, and claimant calls upon libellant to prove these facts.

That claimant further answering the Fourth Article of the libel alleges that on or about September

14th, 1915, said steamship "Eureka" was being loaded at the port of Philadelphia, Pennsylvania, by the said Oregon-California Shipping Co., Inc., under its sub-charter, execution of which claimant has alleged in the Third Article of this answer; that the shipment which libellant has alleged was made on the said steamship on or about September 14th, 1915, was delivered to said Oregon-California Shipping Co., Inc., for carriage to San Francisco, California, via the Panama Canal, and said Oregon-California Shipping Co., Inc., issued to libellant its bill of lading covering said shipment and prescribing the terms of carriage, and libellant paid said Oregon-California Shipping Co., Inc., in advance, the freight for the carriage of said shipment.

Fifth. That it is true as alleged in the Fifth Article of the libel that on or about September 15th, 1915, the libelant shipped on board the steamship "Eureka" at the port of Philadelphia, Pennsylvania, certain batteries consigned to F. H. Murray, at Los Angeles, California, to be carried by the said steamship "Eureka" as a common carrier in accordance with the valid terms of the bill of lading then and there issued for the said shipment, in consideration of an agreed freight which was then and there prepaid for the carriage of said cargo.

That claimant has no knowledge or information sufficient to form a belief as to the truth of the allegations that libellant shipped 124 barrels and 1 box containing batteries (15 barrels short [37] shipped to follow on next steamer), and that said batteries were shipped in good order and condition, and claim-

ant calls upon libellant for proof of these facts.

Claimant further answering the Fifth Article of the libel alleges that on or about September 15th, 1915, said steamship "Eureka" was being loaded at the port of Philadelphia, Pennsylvania, by said Oregon-California Shipping Co., Inc., under said sub-charter, the execution of which claimant has alleged in the Third Article of this answer: that the shipment which libellant alleged was made on said steamship on or about September 15th, 1915, was delivered to said Oregon-California Shipping Co., Inc., for carriage to Los Angeles, California, via the Panama Canal, and said Oregon-California Shipping Co., Inc., issued to libellant its bill of lading covering said shipment and prescribing the terms of carriage, and libellant paid to said Oregon-California Shipping Co., Inc., in advance, the freight for the carriage of said shipment.

Sixth. That it is true as alleged in the Sixth Article of the libel that the said steamship "Eureka" set sail from the port of Philadelphia, Pennsylvania, with certain cargo belonging to the libellant, as to the exact quantity and condition of which at the time of shipment the claimant has no knowledge or information sufficient to form a belief, as the claimant has alleged in the Third, Fourth and Fifth Articles of this answer, and it is true that the steamship "Eureka" has never arrived at the ports of San Pedro (Los Angeles) or San Francisco since she set out from the port of Philadelphia, Pennsylvania, and that said steamship "Eureka" has not delivered said shipments of the libellant to the con-

signees thereof at the respective destinations of said shipments, but the claimant alleges that all of said shipments were at the special order and request of libellant delivered to the libellant at New Orleans, as hereinafter [38] more particularly stated in the Eighth Article of this answer, and claimant further alleges that it is not true that the said steamship "Eureka" has failed to perform the contracts of carriage set forth in the Third, Fourth and Fifth Articles of the libel and of this answer, and to deliver the cargo of the libellant in accordance with the terms of said bills of lading, and claimant alleges that said steamship "Eureka" has fully performed said contracts of carriage as altered and changed at the special request and order of the libellant, as more particularly set forth in the Eighth Article of this answer.

Seventh: That it is true as alleged in the Seventh Article of the libel that on or about October 1st, 1915, the libellant heard that the Panama Canal was closed to navigation; that the libellant immediately inquired of the agents of the steamship "Eureka" as to where she was at the time, and that the agent of the said steamship "Eureka" informed the libellant that said steamship was detained because of the closing of the canal and was then at the port of Colon; that claimant has no knowledge or information sufficient to form a belief as to the truth of the allegations that libellant immediately notified the agents of the said steamship of the perishable character of the goods which libellant had shipped on its said steamship, and that libellant offered to pay for the discharge of said goods and in addition all costs

which might be incurred by way of restowing other cargo on the said steamship which it might be necessary to move in order to discharge the cargo of the libellant; that it is not true, as libellant has alleged, that the libellant demanded delivery of its said goods at Colon, and that notwithstanding said offer of the libellant and said notice of the perishable character of libellant's cargo and said demand for delivery thereof to libellant at Colon those in charge of the steamship "Eureka" failed and refused to deliver said goods to the libellant; that it is also not true that the libellant [39] repeatedly renewed said requests and demanded of those representing the steamship "Eureka" that libellant's cargo be delivered at once to libellant at Colon and that libellant notified those representing said steamship that unless such a delivery was made the cargo would be a total loss because of its perishable nature.

That the true facts are that said steamship "Eureka," bound as hereinbefore set forth from the port of Philadelphia, Pennsylvania, via the Panama Canal, to the ports of San Pedro (Los Angeles) and San Francisco, California, was detained on the Atlantic side of the Panama Canal by a slide which closed said canal to navigation, and made it impossible for said steamship to further continue her voyage as contemplated; that at first it was expected that said canal would be closed for only a few days, but it later became apparent that it would probably remain closed for some time.

That the bills of lading that had been issued by said Oregon-California Shipping Co., Inc., for the

whole cargo of said steamship "Eureka" and for all said shipments of the libellants in particular contained, among others, the following conditions:—

"1. It is mutually agreed that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods; and in case the steamer shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamer; that the carrier shall not be liable for loss or damage occasioned by barratry of the Master or crew; by arrest or restraint of princes, rulers or people, revolutions, lock-outs, labor disputes or labor disturbances of any kind; by breakage of shaft, or the consequences of any damage to or defect in the boilers or machinery; that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, or accidents of navigation of whatsoever kind, or any errors of management (even when occasioned by the wrongful act, default, negligence or error in judgment of the stevedores, or other servants of the steamship owners, dock, graving dock, harbor or other authorities, or their representatives, not resulting, however, in any case from want of due diligence by the owners of the steamer or any of them, or by the ship's Husband or Manager); that the carrier shall not be liable for loss or damage occasioned by putrefaction, change of character,

rain, spray, drainage, loss of contents, or by explosion of any goods, whether shipped with or without disclosure of their nature, [40] or any loss or damage arising from the nature of the goods, or damage arising from other goods by stowage or contact therewith, or through leakage, smell or evaporation therefrom, provided due diligence has been used in stowage of the cargo; nor for damage during inland carriage; nor for obliteration, errors, insufficiency or absence of marks, countermarks, number*d*, address or description nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carriers shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight, or value; also that the steamer is warranted seaworthy only to the extent that the owner shall exercise due diligence to make it so."

"2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transshipment, and in case the whole or any part of the property specified herein be prevented by any cause from going from port in the first steamer of the line stated leaving after the arrival of such property at the port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer or route."

"8. When the loading, transport, transshipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measures, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company, or the Agents shall be entitled to load, discharge, transship, put into warehouse or quarantine depot, or into a lighter, hulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transshipment or warehousing of Customs, including Surtaxe d'Entre P'ot, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods; even though some part of such extra expenses may be occasioned by the fault of the Captain or shipowner; the Master and Owner being discharged from all responsibility on the goods being placed in charge of the Custom House or any Mercantile Agent or Consul."

That when it became apparent that the said canal would probably remain closed for some time the owners and charterers of the said steamship "Eureka" and their agents, endeavored to find some method of transshipping the cargo, of which said shipments of libellants were only a part, to its destinations, said transshipment to be made in accordance with the terms of the bills of lading issued for all of said cargo, and they also investigated the possi-

bility [41] of sending said steamship to the ports of destination via the Straits of Magellan.

That while said steamship was so detained at Colon libellant demanded and insisted that Oregon-California Shipping Co., Inc., transship the libelant's cargo immediately and that libelant would hold both said Oregon-California Shipping Co., Inc., and the owner of said steamship liable for any damage to its cargo in case said steamship should be sent via the Straits of Magellan with libelant's cargo; that libellant at no time demanded of the owners or charterers of the said steamship "Eureka," or their agents, or any of them, any delivery of its cargo at Colon, and libelant at no time offered to take delivery of its cargo at Colon, but insisted that said Oregon-California Shipping Co., Ins., transship its cargo, and claimant is informed and believes that libellant at no time was prepared to or desired to have its cargo delivered to it at Colon; that those in charge of said steamship at no time refused to deliver libelant's cargo to it at Colon.

Eighth. That it is not true as alleged in the Eighth Article of the libel that several weeks elapsed after the offers, requests and demands aforesaid were first made by the libelant and that in the meantime the libelant was in constant communication with those in charge of said steamship "Eureka," renewing libelant's offers, requests and demands from time to time, and it is not true that those representing said steamship still refused to make a delivery of said goods and that nothing was done by those in charge of said steamship until November 22d and

November 23d when said cargo was delivered to libelant at New Orleans, Louisiana; that claimant has no knowledge or information sufficient to form a belief as to the truth of the allegation that it was then discovered that said cargo was badly damaged, and claimant alleges that if the [42] libelant's cargo, or any part thereof, upon delivery to it at New Orleans was damaged, such damages, if any, was not the result of the failure of said steamship to perform its contracts, and was not the result of the failure of those in charge of her to deliver to libelant said goods when demand for delivery thereof was made as libelant has alleged.

That at all times subsequent to the libelant's demand upon the agents of the steamship "Eureka" to transship its cargo, as claimant has alleged in the Seventh Article of this answer, and until said steamship was finally ordered from Colon to the port of New Orleans, as hereinafter alleged, the owners, charterers and agents of said steamship, with the utmost diligence, investigated all means available for getting the cargo of said steamship to the ports of destination with the least possible delay; that after a most thorough and diligent investigation they found that the Panama Canal would remain closed indefinitely, and that it was necessary for the best interests of the consignors and consignees of the cargo of said steamship, including this libellant, that said steamship be diverted to the port of New Orleans, Louisiana, and her cargo transshipped from there by rail to destination; that, therefore, said Oregon-California Shipping Co., Inc., on November

5th, 1915, ordered said steamship "Eureka" to proceed forthwith to the port of New Orleans; that said steamship sailed from Colon on November 5th, 1915, with her full cargo, and arrived at New Orleans on November 12th, 1915.

That on October 24th, 1915, and prior to the time that said Oregon-California Shipping Co., Inc., ordered said steamship "Eureka" to proceed to New Orleans, said Oregon-California Shipping Co., Inc., notified by telegraph all consignees of cargo on said steamship, including libellant and said F. H. Murray, that said **[43]** steamship would be diverted to New Orleans for discharge of her cargo there and for transshipment thence by rail to points of destination; that libellant and said F. H. Murray received said notice on October 25th, 1915, and immediately thereafter and before said steamship left Colon for New Orleans libellant expressly consented to the diversion to New Orleans and the transshipment of all of libellant's cargo from there to destinations by rail.

That upon the arrival of said steamship at New Orleans its cargo was discharged at the Chalmette Docks in said city; that upon the arrival of the said steamship at New Orleans libellant notified said Oregon-California Shipping Co., Inc., that it would take delivery of all three of its said shipments on said steamship "Eureka" at New Orleans; that in accordance with said libellant's order and request all of libellant's cargo was delivered to libellant at said Chalmette Docks in New Orleans between the 16th and 20th days of November, 1915.

Ninth. That none of the allegations contained in the Ninth Article of the libel are true.

Tenth. That none of the allegations contained in the Tenth Article of the libel are true.

Eleventh. That the bills of lading issued by said Oregon-California Shipping Co., Inc., for each of libellant's shipments contained, among other things, the following condition:

> "3. No carrier, or the property of any, shall be liable for gold, silver, precious stones or metals, jewelry, or treasure of any kind, bank notes, securities, silks, furs, laces, pictures, plate, china, glass or statuary, unless bills of lading are signed therefor, in which their nature and value are expressed and extra freight expressed and paid for the assumption of extraordinary risk nor for any loss or damage arising from any of the following causes, viz.: fire from any cause, on land or on water, jettison, ice, freshets, floods, weather, pirates, robbers, or thieves, acts of God or of the country's enemies; riots, [44] strikes, or stoppage of labor, collisions, explosions, accidents to boilers or machinery, or any latent defect in hull, machinery or appurtenances; or unseaworthiness of the ship, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy; stranding, straining, any accident on or perils of the seas or other waters, or of steam or inland navigation; restraints of governments, legal process, claims of ownership by third par-

ties, detention or accidental delay; want of proper cooperage or mending, insufficiency of package in strength or otherwise, use of hooks, rust, dampness, loss in weight, leakage, breakage, sweat, blowing, bursting of casks or packages from weakness or natural causes, evaporation, vermin, frost, heat, smell, contact with or proximity to other goods, natural decay, or exposure to weather; nor for any act, neglect or default whatsoever of the pilots, masters, mariners or other servants or agents of the steamers, or for loss or damage of any kind on goods packed in bales or whose bulk or nature requires them to be carried on deck or on open cars, or for the condition of packages or any deficiency in the contents thereof, if receipted by the consignees as in good order; or for any injury that may happen under any circumstances to, or for the death of any living creature that may be embarked, or sent for embarkation, on board the carriers. Also, that the only conditions on which glass, earthenware, porcelain ware, china, castings and other brittle goods of a like description will be carried, is that neither the shipowner nor his servants and agents, shall be liable for any breakage which may occur, whether arising from negligence of shipowners, servants, or from any cause whatever unless as hereinbefore provided."

that if libellant's cargo was damaged in any particular or in any manner upon delivery to it at New Orleans said damage was due entirely either to the fact

that it was not shipped in good order and condition or to the leakage, evaporation or natural decay of said cargo, and no part of said damage, if any, was due to any act or neglect of said steamship "Eureka," its owners, charterers, agents, or any of them, and, on the contrary, said owners, charterers and agents, at all times used due care and diligence to deliver libellant's cargo at its destinations in the condition in which it was shipped.

Twelfth. That the owners, charterers and agents of the said steamship "Eureka" exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and [45] supplied, and said steamship "Eureka" was seaworthy and properly manned, equipped and supplied at all times when libellant's cargo was on board said steamship on the voyage from New York and Philadelphia to New Orleans.

That libellant's cargo consisted entirely of dry battery cells which were of a perishable nature; that if libelant's cargo was damaged in any particular or in any manner upon delivery to it at New Orleans, said damage was due to the inherent defect, quality and vice of libelant's cargo, and was in no manner and no degree due to any act or neglect of said steamship "Eureka," its owners, charterers, or agents, or any of them; that libellant, by shipping said cargo on board said steamship, assumed the risk of any damage thereto and deterioration thereof due to any delay in delivery thereof not caused by any act or neglect on the part of the vessel, her owners, charterers, or agents, or any of them.

Thirteenth. That the bills of lading issued by said Oregon-California Shipping Co., Inc., for each of libellant's shipments contained, among others, the following condition:

> "6. All articles named in this bill of lading are subject to charges for necessary cooperage and repairs. No liability shall exist for wrong carriage or delivery of goods marked with initials or imperfectly marked, unless name and address of consignee be given in writing at time of shipment; such marking being agreed to be taken as proof of contributory negligence. Should it be found on the cargo being discharged, that goods have been landed without marks or with marks differing from those on the bill of lading, or with marks and numbers not distinguishable, the same shall be apportioned to the different lots, and consignee shall conform to such allotment. All claims for damage to goods must be made and the nature and extent thereof fully disclosed, in the presence of the agent of the company having the same then in custody, before they are removed from the station or wharf. Unless written demand for damage shall be made upon the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been waived, and no suit shall thereafter be maintainable to recover the same. No agent or employee shall have authority to waive such demand." [46]

that libellant on or about November 20th, 1916, and immediately upon delivery of its cargo to it at New Orleans carefully examined and inspected said cargo to ascertain whether or not said cargo or any part thereof was damaged; that libellant at no time within ten days of the delivery of its cargo to it made any written or oral claim or demand upon said Oregon-California Shipping Co., Inc., or the owner, or any charterer of said steamship, or upon any of its agents, or any of them, for damage to its cargo, or any part thereof, and by such failure to make written claim or demand within ten days after delivery of its cargo to its libellant has waived any and all right to claim that its cargo, or any part thereof, was in damaged condition when delivered to it at New Orleans.

WHEREFORE, claimant, Alaska Steamship Company, prays that the libel be dismissed and that the attachment herein be released at the cost of the libellant, and further that the libellant be required to answer, under oath, the interrogatories hereto attached.

PLATT & PLATT and
A. R. WATZEK,
Proctors for Claimant, Alaska Steamship Company.
Address: 605 Platt Building,
Portland, Oregon.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 16, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [47]

Interrogatories Propounded to Libellant Which It is Required to Answer in Writing Under Oath.

First Interrogatory. Upon whom and when did libellant make its alleged demand for delivery of its cargo at Colon?

Second Interrogatory. To whom did libellant demand that its cargo be delivered at Colon?

Third Interrogatory. What was the exact nature and extent of the alleged damages to libellant's cargo?

Fourth Interrogatory. Was the alleged damage to libellant's cargo due solely to the delay in the delivery of the cargo to libellant?

Fifth Interrogatory. Was the alleged damage to libellant's cargo due in whole or in part to any other cause than the alleged delay in the delivery of said cargo to libellant, and if so, to what?

PLATT & PLATT and
A. R. WATZEK,
Proctors for Claimant, Alaska Steamship Company.

United States of America,
Western District of Washington,—ss.

Due service of the within answer of claimant, by certified copy thereof, as required by law, is hereby acknowledged at Seattle, Washington, this 15 day of November, 1916.

REVELLE & REVELLE,
Of Proctors for Libellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 16, 1916.

Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [48]

Order Extending Time Within Which Libellant may Plead.

This matter coming on for an order of this Court extending the time within which the libellant may plead to the answer and interrogatories of the Alaska Steamship Company, claimant, and it appearing to the Court that the attorneys for said claimant have consented to an order extending the time within which the libellant may plead to the answer and interrogatories until the 23d day of December, 1916,—

IT IS HERE AND NOW ORDERED, ADJUDGED AND DECREED that the libellant shall have and is hereby given until the 23d day of December, 1916, within which to plead to the answer and interrogatories of the claimant, Alaska Steamship Company, a corporation.

Done in open court this 27th, day of November 1916.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 27, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [49]

Answer of the Libellant to the Interrogatories Propounded by the Claimant.

Answering the first interrogatory, your libellant notified Messrs. L. Rubelli's Sons at Philadelphia, agents of the steamship "Eureka," in person, on October 9th and by telephone on October 15th, 16th and 19th, and in person on October 22d and 23d by and through Anson J. Mitchell, that the cargo belonging to your libellant which was laden on board the steamship "Eureka" be delivered to it for immediate transshipment. Your libellant also sent a telegram on October 25th, 1915, to the Oregon-California Shipping Company, Inc. Railway Exchange Building, Portland, Oregon, as follows:

> "Confirming notice to your agents, Rubelli, Philadelphia, in person, October ninth, by telephone October fourteenth, sixteenth and nineteenth, and in person October twenty-second and twenty-third, by our Traffic Manager, A. J. Mitchell, we demand and insist our cargo valued about fifteen thousand dollars on steamer "Eureka," be transshipped immediately, our expense. Should "Eureka" containing our cargo proceed via Magellan, we will hold you and owners legally liable for value of goods and damages. Our cargo perishable and worthless unless transshipped immediately and hurried to destination. Considerable damages already accrued by reason your failure to transship in accordance our instructions October ninth.

Have informed Rubelli we will agree to proposition they wired you fourteenth."

Answering the second interrogatory, libelant says:

Mr. A. J. Mitchell, traffic manager of the libellant, volunteered on October 9th to go to Colon for the purpose of receiving the goods. Demand was made that the goods be delivered to the libelant at Colon.

Answering the third interrogatory, libelant says. **[50]**

That the nature and extent of the damage is set forth in an itemized statement annexed hereto, marked Exhibit "A."

Answering the fourth interrogatory, libelant says:

That the said damage was due solely to the delay in delivering the cargo to the libellant.

Answering the fifth interrogatory, libelant says:

That the damage was not due in whole or in part to any other cause than the delay in the delivery of the said cargo to the libelant.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libelant,
No. 64 Wall Street,
New York City.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[51]**

Exhibit "A" Attached to Answer of Libelant to Interrogatories Propounded by Claimant — Itemized Statement.

NATIONAL CARBON COMPANY.
Mail Address, P. O. Box 400.

Cleveland, Ohio, ———.

Sold to
Oregon-California Shipping Co.
Railway Exchange Building,
Portland, Ore.

2% discount if paid within 10 days.
Terms: From date of bill, Net Thirty days.
Subject to sight draft if not paid when due.
F. O. B. Factory.
In correspondence refer to

Acct.
Your order No. Your Req. No. No.

DO NOT CHANGE THIS BILL; IF AMOUNT NOT CORRECT PLEASE RETURN WITH FULL ADVICE.

Quantity. Description.	Price.	Total.
Total brot. ford	4037 5 8	
2¢ per cell depreciation of market 45775 cells	915 5 0	
To freight charges, Cleveland to California for replacing cells 105013 @ 1.25 per cut	1312 6 6	
Total claim	6265 7 4	
Credit acct. expense to Washington	15	625074
Credit acct. 15 Bls. short		53197
Shipped at Phila		571877

Shipped via

To

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [52]

NATIONAL CARBON COMPANY.
Mail Address P. O. Box 400.
Cleveland, Ohio, Sept. 6, 1916.

Sold to
Oregon-California Shipping Co.
Railway Exchange Bldg.,
Portland, Ore.

2% discount if paid within 10 days
Terms: From date of Bill. Net Thirty days
Subject to sight draft if not paid when due
F. O. B. Factory
In correspondence refer to

Acct.

Your order No. Your Req. No. No.

DO NOT CHANGE THIS BILL, IF AMOUNT NOT CORRECT PLEASE RETURN WITH FULL ADVICE.

Quantity.	Description.	Price.	Total.
Aug. 31, 1915,	Itemized bill attached	$3390.69	(See Exhibit 1)
Sept. 4, 1915,	" " "	3642.75	(See Exhibit 2)
Sept. 4, 1915,	" " "	3619.70	(See Exhibit 3)
	Total Value of Goods.....	$10653.14	

Charges:		
Freight, New Orleans to Jersey City	$401.43	
Expenses at New Orleans	261.81	
Labor and material to put cells in shape for shipping at Jersey City	414.40	
Expenses incidental prior to turning goods over, itemized bill attached	137.81	(See Exhibit 4)
Total Charges	1215.45	
	$11868.59	

SHIPPED VIA—CREDIT.

To goods sold, see attached list 7831.01

TO

(See Exhibit 5) 4037.58

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[53]**

EXHIBIT NO. 1.

NATIONAL CARBON COMPANY.

Mail Address P. O. Box 400.

Duplicate

Cleveland, Ohio, Aug. 31, 1915.

Sold to

National Carbon Co.
755 Folsom St.
San Francisco, Calif.

2% discount if paid within 10 days

Terms: From date of Bill. Net Thirty days

Subject to sight draft

if not paid when due
F. O. B. Factory
In correspondence refer to

Your order No. Your Req. No. No.

DO NOT CHANGE THIS BILL, IF AMOUNT NOT CORRECT PLEASE RETURN WITH FULL ADVICE.

Quantity.	Description.	Price.		Total.
10750	2½x6 Columbia Ignitor Cells-Screw Conn	.23425	2518.19	
1000	2½x6 Columbia Ignitor Cells-Screw Conn	.23425	234.25	
625	2½x6 Columbia Cells-Fahn Conn.....	.2295	143.44	
625	2½x6 Columbia Cells-Screw Conn.....	.2295	143.44	
1500	2½x6 Columbia Ignitor Cells-Screw Conn	.23425	351.37	
				3390.69

Penn. Car. 33818

Shipped via
NYC RR—DL&W % Wm Heyman Foreign Frt. Agent prepaid to New York.
To ————, City.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[54]**

EXHIBIT NO. 2.

NATIONAL CARBON COMPANY.

Mail Address P. O. Box 400.

Duplicate

Cleveland, Ohio, Sept. 4th, 1915.

Sold to

F. H. Murray,
419 East 2nd St.,
Los Angeles, Calif.

2% discount if paid within 10 days

Terms: From date of Bill. Net Thirty days

Subject to sight draft if not paid when due

F. O. B. Factory

In correspondence refer to

Acct.

Your Order No. Your Req. No. No.

DO NOT CHANGE THIS BILL, IF AMOUNT NOT CORRECT PLEASE RETURN WITH FULL ADVICE.

Quantity.	Description.	Price.	Total.
13500	2¼x6 Columbia Ignitor Cells-Screw Conn	.23425	3162.38
500	2¼x6 Columbia Ignitor Cells-Screw Conn	.23425	117.12
1000	2¼x6 Columbia Cells-Fahn Conn.....	.2295	229.50
500	2¼x6 Columbia Cells-Screw Conn.....	.2295	114.75
100	2¼x6 Oval Columbia Cells-Screw Conn..	.19	19.00
			3642.75

NYC. 240849

Shipped Via

NYC RR—DL&W—CRR of NJ—P & R %S. Rubellis Sons Philadelphia, Pa

To ————, Prepaid to Philadelphia.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[55]**

EXHIBIT NO. 3.

NATIONAL CARBON COMPANY.

Mail Address P. O. Box 400.

Duplicate

Cleveland, Ohio, Sept. 4, 1915.

Sold to

National Carbon Co.
755 Folsom St.
San Francisco, Calif.

2% discount if paid within 10 days
Terms: From date of Bill Net Thirty days
Subject to sight draft of not paid when due
F. O. B. Factory
In correspondence refer to

Acct.

Your Order No. Your Req. No. No.

DO NOT CHANGE THIS BILL, IF AMOUNT NOT CORRECT PLEASE RETURN WITH FULL ADVICE.

Quantity.	Description.	Price.	Total.
10750	2½x6 Columbia Ignitor Cells-Screw Conn	.23425	2518.19
1000	2½x6 Columbia Ignitor Cells-Screw Conn	.23425	234.25
625	2½x6 Columbia Cells-Fahn Conn.....	.2295	143.44
625	2½x6 Columbia Cells-Screw Conn.....	.2295	143.44
1500	2½x6 Columbia Ignitor Cells-Screw Conn	.23425	351.37
750	2½x6 Sequoia Cells.....	.2045	153.38
300	2½x6 Nay Ignitor-Serew Conn.....	.145	53.50
50	2½x6 Dry Cells-Fahn Conn.....	.30	15.00
25	2½x6 Dry Cells-Fahn Conn.....	.285	7.13
	C. RR. of N. J. No. 30796..... with other goods		3619.70

Shipped Via

NYC. RR—DL&W—CRR. of NJ.—P&R % S Rubellis Sons, Philadelphia, Pa.

Prepaid to Philadelphia.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[56]**

NATIONAL CARBON COMPANY.

Cable Address: Cleveland, Ohio, U. S. A.

"CARBON" CLEVELAND Mark Reply FILE

Copy of Expense Account, Anson J. Mitchell, Trip to New Orleans, La., and New York City 11/11/15 to 12/4/15, Account Dry Battery Cells loaded on the SS. "Eureka."

Transportation	$ 88.25
Expenses and incidentals to packing and recoopering batteries at New Orleans	57.86
Hotel and meals	100.05
Sundries	15.65
	$261.81

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[57]**

EXHIBIT NO. 4.

NATIONAL CARBON COMPANY.

Mail Address P. O. Box 400.

Cleveland, Ohio, Sept. 6, 1916.

Sold to

Oregon-California Shipping Co.,
Produce Exchange Bldg.,
Portland,Oregon.

2% discount if paid within 10 days
Terms: From date of Bill Net Thirty days
Subject to, sight draft if not paid when due
F. O. B. Factory
In correspondence refer to

Acct.

Your Order No. Your Req. No. No.

DO NOT CHANGE THIS BILL. IF AMOUNT NOT CORRECT PLEASE RETURN WITH FULL ADVICE.

QUANTITY	DESCRIPTION	PRICE	TOTAL
	Telephone calls account SS. "Eureka":		
10/14/15	to Philadelphia	6.35	
10/16/15	" "	9.95	
10/19/15	" "	4.55	
11/ 1/15	" "	2.75	
11/ 8/15	" "	2.75	
11/11/15	" "	2.75	$29.10
	Telegrams account SS. "Eureka":		
10/ 1/15	Rubelli Sons, Phila	.40	

10/25/15	Oregon-Calif Shipping Co., Portland, Orc.....3.19		
10/27/15	Do 1.69		
11/. 3/15	Rubelli Sons, Phila .60		
11/ 3/15	Oregon-Calif Shipping 1.21		
11/ 4/15	Oregon-Calif Shipping 1.50		
11/ 5/15	Oregon-Calif Shipping 1.69		$137.81
11/11/15	Kurz, Chicago.....35		
11/11/15	Dwyer " .... .53	11.16	

TRIPS:

10/ 9/15	Trip to Philadelphia 54.25		
10/22/15	Trip to Philadelphia 43.30	97.55	

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [58]

EXHIBIT NO. 5.

LIST OF PANAMA CANAL CELLS SHIPPED.

Date Shipped	Quantity			
Jan. 11, 1916	1125	Cells.....	$	235.46
12	2000	"		393.67
13	3250	"		630.87
14	4250	"		821.77

Date Shipped.	Quantity			
15	3750	"	.....	724.63
17	625	"	.....	118.68
18	625	"	.....	114.63
19	125	"	.....	31.88
20	1000	"	.....	200.52
21	1750	"	.....	375.00
25	375	"	.....	82.50
27	758	"	.....	156.24
28	1125	"	.....	230.29
29	1375	"	.....	281.76
31	1875	"	.....	397.90
Feb. 1	250	"	.....	50.57
2	3675	"	.....	741.67
3	125	"	.....	30.00
4	125	"	.....	26.25
5	375	"	.....	76.12
7	375	"	.....	86.25
8	1750	"	.....	356.77
9	1125	"	.....	227.08
10	125	"	.....	30.00
11	125	"	.....	30.00
14	125	"	.....	26.25
16	500	"	.....	79.88
17	500	"	.....	116.25
18	125	"	.....	30.00
19	2125	"	.....	435.68
21	625	"	.....	107.99
24	250	"	.....	25.50
25	375	"	.....	79.32
26	300	"	.....	55.50
28	500	"	.....	102.37

Date Shipped.	Quantity		
Mar. 6	125	"	30.00
14	125	"	30.00
24	375	"	74.81
25	1000	"	209.05
27	125	"	23.13
		TOTAL.....	$7,903.23

Account Goods returned:

322 Cells @ 22¢ each.....	$70.84	
6 " @ 23¢ "	1.38	72.22
Total Value of Goods Sold.....		$7,831.01

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[59]**

Due and timely service of a copy of the within answers to interrogatories is admitted this 20th day of Dec., 1916, and libellant's time to file same is extended to and including January 10th, 1917.

PLATT & PLATT,
Proctors for Claimant.

Time to except to same hereby extended to January 15, 1917.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant. **[60]**

Memorandum Decision.

Filed Oct. 10, 1917.

HARRINGTON, BIGHAM & ENGLER, REVELLE & REVELLE, for Libelant.

PLATT & PLATT, for Claimant.

CUSHMAN, District Judge.

Libelant seeks to recover on account of damage alleged to have been caused certain dry cell batteries shipped upon the "Eureka" at Philadelphia in September, 1915, for San Pedro and San Francisco, by way of the Panama Canal. The cause of the damage is alleged to have been the tropical heat at Colon, where the ship remained from October 1st until November 5th, when it proceeded to New Orleans, arriving in the latter place November 12th, where the goods in question were delivered to libelant a short time subsequent thereto.

Material parts of the bills of lading provide: **[61]**

> "1. It is mutually agreed that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods; and in case the steamer shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamer; that the carrier shall not be liable for loss or damage occasioned by barratry of the Master or crew; by arrest or restraint of

princes, rulers or people, revolutions, lock-outs, labor disputes or labor disturbances of any kind; by breakage *or* shaft, or the consequences of any damage to or defect in the boilers or machinery; that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, or accidents of navigation of whatsoever kind, or any errors of management (even when occasioned by the wrongful act, default, negligence or error in judgment of the stevedores, or other servants of the steamship owners, dock, graving dock, harbor or other authorities, or their representatives, not resulting, however, in any case from want of due diligence by the owners of the steamer or any of them, or by the ship's Husband or Manager); that the carrier shall not be liable for loss or damage occasioned by putrefaction, change of character, rain, spray, drainage, loss of contents, or by explosion of any goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods, or damage arising from other goods by stowage or contact therewith, or through leakage, smell or evaporation therefrom, provided due diligence has been used in stowage of the cargo; nor for damage during inland carriage; nor for obliteration, errors, insufficiency or absence of marks, countermarks, numbers, address or description nor for risk or craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the car-

riers shall not be concluded as to correctness of statements herein of quality, guage, contents, weight, or value; also that the steamer is warranted seaworthy only to the extent that the owner shall exercise due diligence to make it so.

"2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transshipment, and in case the whole or any part of the property specified herein be prevented by any cause from going from port in the first steamer of the line stated, leaving after the arrival of such property at the port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer or route."

"8. When the loading, transport, transshipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measures, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled to load, discharge, transship, [62] put into warehouse or quarantine depot, or into a lighter, hulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transshipment or warehousing of Customs, including Surtaxe d'Entre P'ot, and all extra expenses of whatsoever kind incurred in consequence of

> the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods; even though some part of such extra expense may be occasioned by the fault of the Captain or shipowner; the Master and Owner being discharged from all responsibility on the goods being placed in charge of the Custom House or any Mercantile Agent or Consul."

The primary cause of the delay at Colon is admitted to have been earth slides blocking the Canal, on account of which passage through it was prevented and forbidden by the United States Government. Libelant seeks to bring the case within an implied exception to any exemption on account of an act of God, or the provisions of the bills of lading, and invokes the rule laid down in the case of "The Martha" (35 Fed. 313), wherein it was held:

> "The steamship 'Martha' put into Halifax in distress, where she was detained for repairs from October until February. The consignee of glycerine on board of her, hearing of her probable detention, demanded delivery of the glycerine at Halifax, offering to pay the full freight under the bill of lading, together with all incidental expenses, and to sign a general average bond. This was refused, and on delivery of the cargo finally in New York, the glycerine was found damaged. Held, that the vessel was liable for the damage."

The "probable detention," mentioned in the above syllabus, was for the purpose of having portions of

the broken engines made in Europe and forwarded to Halifax.

Claimant contends that the present case is distinguished from that of the "Martha" in that, in the instant case, at no time was there any certainty of a long delay of the "Eureka," at Colon and that no general average bond was tendered with the demand for delivery.

The question first to be determined is the sufficiency of the oral demand for the delivery of the goods in question to [63] libelant at Colon, which demand is claimed by libelant to have been made by its traffic manager upon L. Rubelli's Sons. It is claimed by libelant that the firm, L. Rubelli's Sons, was the general agent of the subcharterer, the Oregon-California Shipping Co., and that, therefore, a demand upon that company was sufficient.

The Oregon-California Shipping Co., is a corporation, with its principal office at Portland, Oregon. H. M. Williams was, at the times in question, its general manager. The firm, L. Rubelli's Sons, had its principal place of business at Philadelphia. H. M. Williams was in no way associated with the latter company. Charles Kurtz was general manager of L. Rubelli's Sons.

While the steamship "Eureka" is now owned by claimant, in September, 1915, she was owned by the Pacific Coast Steamship Company, a corporation, which had chartered her to the Crossett Western Lumber Company, a corporation; the latter company had sub-chartered the "Eureka" to H. M. Williams & Co., Inc., a corporation, which, in turn,

subchartered her to the Oregon-California Shipping Co., Inc., a corporation.

Upon claims for damage to the dry cell batteries being made by libelant, both L. Rubelli's Sons and Phelps Bros. & Co. (a sub-agent of L. Rubelli's Sons) wrote letters to libelant, advising it of the fact that they were only agents of the Oregon-California Shipping Co. for the purpose of soliciting and providing cargo at New York and Philadelphia for its vessels. Charles Kurz, the general manager of L. Rubelli's Sons, a witness for libelant, testified to the same effect. No written agreement was introduced in evidence defining the scope of the authority of L. Rubelli's Sons or Phelps Bros. & Co. A letterhead used by L. Rubelli's Sons was in the following form: **[64]**

"OREGON–CALIFORNIA SHIPPING CO., INC.
'Quaker Line.'
Pier 16, South Wharves,
(Foot of Spruce St.)
"L. RUBELLI'S SONS, General Agents.
Chas. Kurz, General Manager,
F. W. Davis, Traffic Manager,
R. B. Bates, Ass't Traffic Manager."

There is no testimony that libelant was misled by the designation 'General Agents' after the words "L. Rubelli's Sons" used upon this letterhead, or that the same was so used with the knowledge of the Oregon-California Shipping Co. Mr. Kurz testifies in explanation of this:

> "A. That is right, that is what we did do, the general agency that I referred to meant that we

had charge of the different sub-agents but only as to the solicitation of cargo."

In demanding a transshipment of its goods across the Isthmus, libelant made its demand upon the Oregon-California Shipping Co. and upon L. Rubelli's Sons. The fact that a demand for delivery at Colon had been made upon L. Rubelli's Sons was communicated to the Oregon-California Shipping Co. in the following telegram:

"Philadelphia, Oct. 18, 1915.

Oregon-California Shipping Co.

National Carbon Company insist their shipments Eureka should not go via Magellan account batteries would be worthless on arrival destinations stop they offered pay all expenses discharging including loading back on board any other goods in order to forward their goods from Colon stop. We made them proposition our wire fourteenth which they state very satisfactory stop to avoid heavy claims better tranship cargo wire quick.

L. RUBELLI'S SONS."

The reference to the proposition in the wire of the 14th did [65] not contemplate a delivery to libelant at Colon.

The above telegram was not the transmission of a demand to the principal for delivery at Colon, but the submission of a later and different proposition to tranship so that the Oregon-California Shipping Co. was not, at the time of its receipt, called upon to act upon such demand for delivery in any way, but was, rather, led to believe that it had been abandoned.

While the "Eureka" was lying at Colon, a number of telegrams passed between L. Rubelli's Sons and the captain of the "Eureka," but the captain carried out no orders involving the management of the ship or cargo given by L. Rubelli's Sons. He simply advised them of the conditions at the Canal and, in one telegram, made a suggestion on transshipment of the cargo as follows:

> " * * would advise you to discharge cargo here tranship cargo Pacific Port send us back for another load it will take about seventy-five days via Strait of Magellan."

The language here used, if given the full significance of which it is capable, supports libelant's contention; but it is, I think, to be explained by reason of the fact that the Captain of the "Eureka" was looking to L. Rubelli's Sons to furnish his next cargo, when he could get rid of the cargo he had, which he was unable to move.

The telegrams during this time exchanged between L. Rubelli's Sons and the Oregon-California Shipping Co. can all be reasonably explained upon the grounds that it was to the interest of both that the cargo be got through to its destination and the "Eureka" kept in some trade, even if deverted to the West India trade, and that the former company, not only on account of the business in which it was engaged, but its location, was better situated to find another charterer or cargo than the sub-charterer, [66] the Oregon-California Shipping Co.

Late in October, Kurz, the general manager of L. Rubelli's Sons, went to Portland, Oregon—the prin-

cipal place of business of the Oregon-California Shipping Co.—from which place he wired directions to the captain of the "Eureka," but they were not followed by the latter. The following telegram was thereafter sent the captain from Portland, on Novemebr 4th:

"Baggott, Colon:

Sail tomorrow morning to New Orleans. We will be there on arrival when are you due at destination. Keep destination strictly confidential. Telegraph us your sailing.

CALIFORNIA SHIPPING CO.
KURZ,

Charge Oregon-California Shipping Co."

The Captain thereupon proceeded with the "Eureka" to New Orleans, where the ship was met by Mr. Kurz, manager of L. Rubelli's Sons, and Mr. Williams, general manager of the Oregon-California Shipping Co.

This telegram I interpret as from both the Oregon-California Shipping Co. and Mr. Kurz, as the representative of L. Rubelli's Sons. It will be noted in the signature that Kurz does not sign after the name of the company, Oregon-California Shipping Co., as would ordinarily be done if he was telegraphing on its behalf, or as its agent. The telegram says "*we* will be there" (New Orleans); that is, Kurz, as the representative of L. Rubelli's Sons and a representative of the Oregon-California Shipping Co. (Mr. Williams.)

While L. Rubelli's Sons may have ceased to legally represent the shippers at the time of this trouble,

yet, from the situation, it is clear that that firm might be a factor in the control of the good will of such shippers, as well as assist in finding another cargo in New Orleans for the "Eureka." That [67] company would be interested in doing all that could be done to preserve the good will of its customers—the shippers. This and the mutual advantage accruing to both companies from keeping the "Eureka" in trade explain the activities of Mr. Kurz.

As the whole equals the sum of all its parts, in determining whether the firm, L. Rubelli's Sons, was the general agent of the Oregon-California Shipping Co., it is as important to consider the character of the duties it did not perform as those it did.

In the face of a positive denial of general agency, the evidence falls far short of showing a continued course of dealing sufficient to establish the fact of such an agency, especially in view of the extraordinary happening out of which the orders given by L. Rubelli's Sons grew. There is no evidence of any single instance in which that company acted upon or settled any disputed or questioned claim against the "Eureka," or, for that matter, a claim of any kind.

The charter fairly contemplated other voyages than the one in question. There is no evidence to show but that L. Rubelli's Sons' connection ended with this voyage and the shipments they had secured therefor. Nor is there anything to show more than a general understanding that that company would, for an indefinite time, continue to provide cargo on

the vessel's trips from the Atlantic seaboard.

Such a connection is not sufficient to establish general agency. Libelant's asserted claim must, therefore, fail, and it will not be necessary to consider the numerous other questions which have been presented.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [68]

Final Decree for the Claimant.

THIS CAUSE, having come on to be heard upon the pleadings and proof adduced by the respective parties, and having been argued by the respective advocates, now, on motion of Platt & Platt, Proctors for the claimant,

IT IS ORDERED, ADJUDGED AND DECREED, that the libel herein be, and the same is hereby, dismissed, with costs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Alaska Steamship Company, the claimant above named, recover herein against the libellant the sum of $191.95, fixed and allowed as costs, and that execution issue therefor, and

IT IS FURTHER ORDERED, that unless this decree be satisfied, or an appeal be taken therefrom, within the time limited and prescribed by law and the rules and practice of this court, the stipulators, for costs on the part of the libellant, cause the engagements of their stipulation to be fulfilled, or show cause within four days thereafter why execu-

tion should not issue against their goods, chattels, and lands to satisfy this decree.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Oct. 15, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[69]**

Notice of Appeal.

To the Steamship "Eureka," etc., and the Alaska Steamship Company, a Corporation, and to Messrs. Platt & Platt and Farrell, Kane & Stratton, Attorneys for respondent and Claimant: and to the Clerk of the United States District Court:

Please take notice that the libelant above named hereby appeals from the final decree made and entered herein on the 15th day of October, 1917, to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit at the City of San Francisco, in the State of California.

Dated Seattle, Washington, October 16th, 1917.

HARRINGTON, BIGHAM & ENGLER, and
REVELLE & REVELLE,
By G. H. REVELLE,
One of the Proctors for Appellant.

Service of the within Notice of Appeal by delivery of a copy to the undersigned is hereby acknowledged

this 17th day of October, 1917.

PLATT & PLATT,
Attorney for Claimant and Respondent.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 20, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [70]

Assignment of Errors.

The libellant hereby assigns errors in the rulings and proceedings of the District Court herein, as follows:

I.

For that the Court erred in entering a final decree dismissing the libel herein.

II.

For that the Court erred in refusing to enter a decree in favor of the libellant for the damages sustained by them by reason of the acts and things done and performed by the respondent and claimants herein and the acts and things which they failed to do and perform as set forth in the pleadings herein with interest and costs and in not adjudging the respondent and its servants the master and crew of said steamship "Eureka," at fault or liable on account of things done and performed by them as set forth in said libel on file herein.

Dated Seattle, King County, State of Washington, October 19th, A. D. 1917.

HARRINGTON, BIGHAM & ENGLER, and
REVELLE & REVELLE,
By GEO. H. REVELLE,
One of the Proctors for Libellant and Appellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 20, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[71]**

Order Allowing Appeal.

This matter coming on upon the application of Revelle & Revelle, represented by George H. Revelle, one of the proctors for the libelant in the above-entitled cause, for an order of this Court allowing libelant herein to appeal from the decision of this court rendered in the above-entitled cause on the 15th day of October, 1917, and the court being fully advised in the premises, it is now here

ORDERED, ADJUDGED AND DECREED, that the libelant be and it is hereby allowed to appeal from the decree of the District Court of the United States for the Western District of Washington, Southern Division, entered in the above-entitled cause on the 15th day of October, 1917, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of October, A. D. 1917.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the Western District of Washington, Southern Division.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 20, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [72]

Notice of Filing Bond on Appeal.

To Messrs. Platt & Platt and to Farrell, Kane & Stratton, Attorneys for Respondent and Claimant Above Named:

You will please to take notice that the bond on appeal herein has been this day filed in the office of the clerk of the District Court of the United States for the Western District of Washington, Southern Division, and executed and given by the above-named libelant and by the Royal Indemnity Company, a corporation authorized under the laws of the State of Washington to do business within said State, and within the territory in which the above-entitled court has jurisdiction.

Yours respectfully,

REVELLE & REVELLE,
By G. H. REVELLE,
One of the Proctors for Libelant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 20, 1917.

Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [73]

Stipulation to Send Original Deposition and Exhibits Attached Thereto to Appellate Court

IT IS HEREBY STIPULATED AND AGREED, by and between the libelant above named, the National Carbon Company, by and through its proctors, Harrington, Bigham & Engler and Revelle & Revelle, and the claimant and respondent, above named, Alaska Steamship Company by and through its proctors Messrs. Platt & Platt, that the clerk of the District Court shall send up as a part of the apostle on appeal to the United States Circuit Court of Appeals, the original depositions and the exhibits attached thereto, which depositions and exhibits were introduced in evidence by the libelant above named in support of its cause of action as set forth in its libel and which said depositions and exhibits are now on file in the office of the clerk of the United States District Court, having jurisdiction of the above-entitled cause.

IT IS FURTHER STIPULATED AND AGREED by the respective parties hereto that said original depositions and exhibits need not be printed as a part of the apostles on appeal but that the same shall be considered on the hearing of said cause by the United States Circuit Court of Appeals as a part of the record on appeal in said cause and as though the same had been printed as provided for by the rules of said court.

It is further stipulated and agreed that the order of the above-named court shall be entered by the United States District Judge ordering and directing that the same be transmitted to the U. S. Circuit Court of Appeals as herein agreed and for the purposes herein named.

Dated this 6th day of December, A. D. 1917.

NATIONAL CARBON COMPANY,
Libelant. [74]

By HARRINGTON, BIGHAM & ENGLER,
REVELLE & REVELLE,
By G. H. REVELLE,
Proctors for Libelant.

S. S. "EUREKA," etc.
ALASKA STEAMSHIP COMPANY,
Claimant and Respondent.

MESSRS. PLATT & PLATT,
By PLATT & PLATT,
Proctors for Claimant and Respondent.

Original Order Directing Transmission of Original Depositions and Exhibits to Appellate Court.

THIS MATTER coming on upon the stipulation above set forth for an order of this Court directing that the original depositions and exhibits on file in this cause, be sent up to the United States Circuit Court of Appeals, and providing for said depositions to be considered by the United States Circuit Court of Appeals on appeal without the same being printed as required by the rules of court, and the Court being duly advised in the premises, it is here and now

ORDERED, ADJUDGED AND DECREED that the original depositions and exhibits on file in the

above-entitled cause be sent up to the United States Circuit Court of Appeals, on appeal by the clerk of this court, and that the said original depositions and exhibits need not be printed as a part of the apostle on appeal as required by the rules of this Court, but the same shall be considered by the United States Circuit Court of Appeals, on appeal, without the formality of printing the same, and shall constitute a part of the apostle on appeal required to be sent up on said cause.

Done in open court this 10th day of December, A. D. 1917.

EDWARD E. CUSHMAN,
Judge. [75]

O. K. as to form.

PLATT & PLATT.

Stipulation filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Order filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 10, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [76]

Stipulation Extending Time Within Which Record on Appeal may be Prepared and Filed With the Clerk of the U. S. Circuit Court of Appeals.

IT IS HEREBY STIPULATED AND AGREED, by and between the libelant by and through its proctors Revelle & Revelle and Harrington, Bigham & Engler, and the Alaska Steamship

Company, Claimant by and through the proctors for respondent and claimant, Messrs. Platt & Platt, that the appellant may have sixty days from the date of this stipulation within which to prepare and file with the clerk of the Circuit Court of Appeals, the record or apostle on appeal in this cause.

Dated this 29th day of October, 1917.

REVELLE & REVELLE,
By G. H. REVELLE,
Proctors for Appellant.
PLATT & PLATT,
By HUGH MONTGOMERY,
Proctors for Respondent and Claimant, Alaska Steamship Co.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [77]

Order Extending Time to File Apostles on Appeal in Appellate Court Sixty Days from October 29, 1917.

This matter coming on to be heard upon the application of the proctors for the libelant herein, the National Carbon Company, a corporation, and it appearing to the court that the libelant and claimant by and through their attorneys, have entered into a stipulation extending the time within which to prepare and file with the clerk of the Circuit Court of Appeals, the record or apostle on appeal in this cause, for sixty days from the 29th day of October, 1917, and the court being fully advised in the premises, it is now and here

ORDERED that the time within which the appellant in the above-entitled matter shall prepare and file with the clerk of the Circuit Court of Appeals the record or apostle on appeal in this cause, is hereby extended for a period of sixty days from and after the 29th day of October, 1917.

Done in open court this 16th day of November, A. D. 1917.

EDWARD E. CUSHMAN,
Judge of the U. S. District Court, Western District of Washington, Southern Division.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [78]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

NATIONAL CARBON COMPANY, a Corporation,
Libelant and Appellant,

vs.

Steamship "EUREKA," Her Engines, Boiler, Tackle, Apparel, Furniture, etc.,

And

ALASKA STEAMSHIP COMPANY, a Corporation,
Claimant and Appellee.

Citation on Appeal (Copy).

To the Above-named Respondent and Claimant, Steamship "Eureka," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., and the Alaska Steamship Company, a Corporation, and to Their Proctors, Messrs. Platt & Platt, and to the Clerk of the United States District Court:

You and each of you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to the appeal filed in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division, wherein the National Carbon Company, a corporation, is appellant, and the above-named respondent and claimant are appellees and to show cause if any there be, why the decree entered against libelant and appellant and in favor of said respondent and claimant, appellee, on the 15th day of October, [79] 1917, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 10th day of December, A. D. 1917.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the Western District of Washington, Southern Division.

We, the undersigned proctors for the respondents and claimant, appellee, named in the above-entitled cause, do hereby accept service of the foregoing citation and acknowledge the receipt of a copy thereof by delivery to us on this 12th day of December, A. D. 1917.

STEAMSHIP "EUREKA," et al.,
Respondents.
ALASKA STEAMSHIP COMPANY,
Claimant and Appellee.
By PLATT & PLATT,
Proctors for Respondent and Appellee.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 15, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [80]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of National Carbon Company, a Corporation, Libelant, vs. Steamship "Eureka," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., Respondent, and Alaska Steamship Company, a Corporation, Claimant, No. 2049, in said District Court, as required by praecipe of proctors for libelant and appellant filed and shown herein and as the originals

thereof appear on file and of record in my office in said district at Tacoma.

I further certify and return that I hereto attach and herewith transmit the original citation on appeal and the original order extending time to file the record in the United States Circuit Court of Appeals.

I further certify and return that under separate cover I am forwarding to said Circuit Court of Appeals as a part of the Apostles on Appeal all of the original depositions with the exhibits attached thereto, which were filed and introduced in evidence in the trial of said cause in said District Court, in accordance with the stipulation of proctors for both sides filed in said District Court December 8, 1917, and in accordance with the Order of Court directing the same filed in said District Court December 10, 1917, which said Stipulation and Order are shown in said Apostles on Appeal.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the appellant herein, for making [81] record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 180 folios at 15¢ each.....$27.00

Certificate of Clerk to Transcript, 3 folios at 15¢ each and seal..... .65

Certificate of Clerk to Depositions, 2 fo. & seal .50

ATTEST my hand and the seal of said District Court at Tacoma, in said District this 22d day of December, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy Clerk. [82]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

NATIONAL CARBON COMPANY, a Corporation,
Libellant and Appellant,
vs.

Steamship "EUREKA," Her Engines, Boiler, Tackle, Apparel, Furniture, etc.,
Respondent,

and

ALASKA STEAMSHIP COMPANY, a Corporation,
Claimant and Appellee.

Citation on Appeal (Original).

To the above-named Respondent and Claimant, Steamship "Eureka," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., and the Alaska Steamship Company, a Corporation, and to Their Proctors Messrs. Platt & Platt, and to the Clerk of the United States District Court:

You, and each of you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to the appeal filed in the office of the Clerk of the United States District Court for the Western District of Washington, Southern Division, wherein the National Carbon Company, a corporation is Appellant, and the above-named respondent and claimant are appellees and to show cause if any there be, why the decree entered against libellant and appellant and in favor of said respondent and claimant, appellee, on the 15th day of October, 1917, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 10th day of December, A. D. 1917.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the Western District of Washington, Southern Division.

We, the undersigned proctors for the respondents and claimant, Appellee, named in the above-entitled cause, do hereby accept service of the foregoing citation and acknowledge the receipt of a copy thereof

by delivery to us on this 12th day of December, A. D. 1917.

STEAMSHIP "EUREKA" et al., Respondents.

ALASKA STEAMSHIP COMPANY,
Claimant and Appellee.
By PLATT & PLATT,
Proctors for Respondent and Appellee.

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Southern Division. National Carbon Co., Appellant, vs. S. S. "Eureka" and Alaska Steamship Co., Respondent and Appellee. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 15, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 2049.

NATIONAL CARBON COMPANY, a Corporation,
Libellant,

vs.

Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc.,
Respondent,

and

ALASKA STEAMSHIP COMPANY, a Corporation,
Claimant.

Order Extending Time to File Apostles on Appeal in Appellate Court Sixty Days from October 29, 1917.

This matter coming on to be heard upon the application of the proctors for the libellant herein, the National Carbon Company, a corporation, and it appearing to the Court that the libellant and claimant by and through their attorneys, have entered into a stipulation extending the time within which to prepare and file with the Clerk of the Circuit Court of Appeals, the record or apostle on appeal in this cause, for sixty days from the 29th day of October, 1917, and the Court being fully advised in the premises, it is now and here

ORDERED that the time within which the appellant in the above-entitled matter shall prepare and file with the clerk of the Circuit Court of Appeals the record or apostle on appeal in this cause, is hereby extended for a period of sixty days from and after the 29th day of October, 1917.

Done in open court this 16th day of November, A. D. 1917.

EDWARD E. CUSHMAN,
Judge of the U. S. District Court, Western District of Washington, Southern Division.

[Endorsed]: No. 2049. In the District Court of the United States for the Western District of Washington, Southern Division. National Carbon Co., vs. S. S. "Eureka" and Alaska Steamship Company. Order Extending Time. Filed in the U. S. District

Court, Western Dist. of Washington, Southern Division. Nov. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 3102. United States Circuit Court of Appeals for the Ninth Circuit. National Carbon Company, a Corporation, Appellant, vs. Alaska Steamship Company, a Corporation, Claimant of the Steamship "Eureka", Her Engines, Boilers, Tackle, Apparel, Furniture, etc., Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed December 26, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3102

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL CARBON COMPANY, a Corporation,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc.,
Appellee.

LIBELANT'S EXHIBIT No. 1---DEPOSITIONS ON BEHALF OF LIBELANT, ETC.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3102

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL CARBON COMPANY, a Corporation,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc.,
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INDEX TO LIBELANT'S EXHIBIT NO. 1.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. ——

NATIONAL CARBON COMPANY, a Corporation,
Libellant,

vs.

Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc.,
Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,
Claimant.

Notice to Take Deposition of Anson J. Mitchell.

To the Alaska Steamship Company, Claimant, and to Messrs. Platt & Platt and to W. B. Stratton, Attorneys of the Alaska Steamship Company:

You will please take notice that Anson J. Mitchell, a witness on behalf of the libellant herein, whose testimony is necessary in this cause, and who is out of the District in which this cause is to be tried, and to a greater distance than one hundred miles from the place of trial, will be examined *de bene esse* on the part of the libellant in this cause, before C. May Hudson, a notary public, at the office of Messrs. Harrington, Bigham & Englar, No. 64 Wall Street, New York City, New York County, State of New York, on the 14th day of December, 1916, at the hour of 10 o'clock in the forenoon, at which time and place you are hereby notified to be present and put in interrogatories, if you shall have any.

Dated, Seattle, King County, State of Washington, this 2d day of December, 1916.

HARRINGTON, BIGHAM & ENGLAR and
REVELLE & REVELLE,
Attorneys for Libellant.

[Endorsed]: Copy. No. —— In the District Court of the United States, for the Western District of Washington, Northern Division. National Carbon Company, Libellant, vs. Steamship "Eureka," etc., Respondent, Alaska Steamship Company, Claimant. Notice to Take Deposition of Anson J. Mitchell.

Service of papers in this case may be made upon Revelle & Revelle, Attorneys for Libellant, at Room 605, New York Block, Seattle, Washington.

Service of the within notice by delivery of a copy to the undersigned is hereby acknowledged this 2d day of December, 1916.

FARRELL, KANE & STRATTON,
PLATT & PLATT,
Attorneys for Claimant, Alaska Steamship Company.

In the District Court of the United States for the Western District of Washington, Southern Division.

IN ADMIRALTY—No. ——

NATIONAL CARBON COMPANY, a Corporation, Libellant,

vs.

Steamship "EUREKA," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant.

Notice to Take Depositions of R. H. Bagott, H. M. Williams and Charles Kurz.

To National Carbon Company, a Corporation, Libellant, and to Messrs. Harrington, Bigham & Englar and Messrs. Revelle & Revelle, Proctors for Libellant.

You will please take notice that the depositions of R. H. Bagott, H. M. Williams and Charles Kurz, whose testimony is necessary in this case, and each of whom is out of the district in which this case is to be tried, and each of whom is at a distance of more than one hundred miles from the place of trial, will be taken *de bene esse* on behalf of Alaska Steamship Company, a corporation, claimant, before C. May Hudson, a notary public, at the office of Messrs. Harrington, Bigham & Engler, No. 64 Wall Street,

New York City, State of New York, on the 18th day of December, 1916, at the hour of 10:00 o'clock in the forenoon, at which time and place you are hereby notified to be present and put in interrogatories, if you shall have any.

Dated at Portland, Multnomah County, State of Oregon, this 6th day of December, 1916.

PLATT & PLATT,

Proctors for Alaska Steamship Company, Claimant.

[Endorsed]: In the District Court of the United States, for the Western District of Washington, Southern Division. National Carbon Company, Libellant, vs. Steamship "Eureka," etc., Respondent. Alaska Steamship Company, Claimant. Notice to Take Depositions.

[1*] *United States District Court, Western District of Washington.*

NATIONAL CARBON COMPANY,

Libellant,

against

Steamship "EUREKA," Her Engines, etc.

Depositions.

Depositions taken in behalf of the libelant on the 14th day of December, 1916, at 10 A. M., at the office of Messrs. Harrington, Bigham & Englar, 64 Wall Street, New York City, pursuant to notice.

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*Page-number appearing at top of page of original certified Libelant's Exhibit No. 1.

APPEARANCES:

Messrs. HARRINGTON, BIGHAM & ENGLAR (FRANK C. WELLES, Esq.), Proctors for Libelant.

Messrs. PLATT & PLATT (ROBERT TREAT PLATT, Esq.), of Portland, Oregon, Proctors for the Claimant of the S. S. "Eureka" and the Alaska Steamship Company.

It is stipulated that the testimony may be taken by a stenographer, fees to be taxable as costs, signing waived.

Deposition of Anson J. Mitchell, for Libelant.

[2] ANSON J. MITCHELL, called as a witness on behalf of the libelant, having been duly sworn, testified as follows:

(By Mr. WELLES.)

Q. Mr. Mitchell, are you connected with the National Carbon Company, the libelant in this action?

A. I am.

Q. In what capacity?

A. Traffic manager in charge of all shipping and receiving of freight.

Q. Are you also familiar with the manufacturing methods of the company?

A. Fairly familiar; yes.

Q. And with the other business of the company?

A. Yes.

Q. What has been your experience with dry batteries and their manufacture?

A. We have been in the dry battery business—I

(Deposition of Anson J. Mitchell.)

have been with them since we started in the dry battery business 12 to 13 years ago.

Q. During that time have you been connected with the construction and testing of such batteries?

A. Indirectly, yes, the shipping of all batteries comes in under my jurisdiction. I have a superintendent of shipping, who reports to me, and he has men under him who have charge of the testing of all dry batteries.

Q. I mean just personally, as regards testing, etc., of batteries?

A. I know how to test, and did make tests right along for my own information in order to keep in close touch with the business.

Q. I show you a paper headed Oregon-California shipping [3] Co., Inc., and ask you if you know what that is?

A. That is the bill of lading issued by the agent of the Oregon-California Shipping Co., Inc., at New York, covering the shipment of 116 barrels of battery cells, part of the shipment involved in this action.

Q. Is that a bill of lading of part of the goods involved in this case?

A. It is a bill of lading covering one carload of 116 barrels.

The bill of lading is offered in evidence. It is marked Libelant's Exhibit 1.

Q. I show you another paper headed National Carbon Company, and ask you if you know what that is?

(Deposition of Anson J. Mitchell.)

A. That is an invoice showing the value of the cells in the car covered by the bill of lading just mentioned.

Q. Value where?

A. Value at Jersey City or New York City.

Q. Was there any difference in this and the value at Cleveland?

A. Practically none, we make the values the same at Jersey City and at Cleveland.

Q. Was the value the same at the California points of destination?

A. We add the freight rate to that, which would be about three cents a cell. If those had to be delivered at San Francisco, instead of being sold at 21½ cents they would be sold at 24 or 25 cents.

Q. Were the goods set forth in that invoice shipped?

[4] A. Yes, we have reason to believe that they were, the bill of lading from the railroad company shows it and the bill of lading from the steamship company shows it.

Q. Are those the contents of the 116 barrels mentioned in the bill of lading? A. They are.

Q. Are you familiar with the price or value of such cells in the market at the time of this statement, August 31, 1915? A. I am.

The invoice is offered in evidence. It is marked Libelant's Exhibit 2.

Mr. PLATT.—As I understand counsel, the statement now offered in evidence is offered merely to abbreviate the witness' testimony, and not on the

(Deposition of Anson J. Mitchell.)

theory that this paper itself was brought to the attention of the Oregon-California Shipping Co., Inc., or its agents, or anyone representing the ship or the claimant.

Q. Did this paper, exhibit 2, or a copy of it, ever reach the Oregon-California Shipping Co., Inc., or its agents?

A. A copy was attached to my claim papers when rendering same under date of September 6.

Mr. PLATT.—With the understanding that this document now offered in evidence will be connected up with the claim we have no objection to it.

Q. Have you compared this statement with the copy offered in connection with your claim?

[5] A. Yes, compared it at the time the claim was entered.

Q. I show you another paper, headed Oregon-California Shipping Co., Inc., and ask you if you know what that is?

A. A bill of lading covering 12 boxes and 123 barrels of battery cells, part of the original shipment delivered for transporting at Philadelphia.

Q. Whose bill of lading was it?

A. Oregon-California Shipping Co.'s bill of lading.

Q. Is that a bill of lading of part of the goods involved in this action? A. It is.

Q. Were these goods actually shipped?

A. They were.

Q. And delivered to the SS. "Eureka"?

A. They were.

(Deposition of Anson J. Mitchell.)

Q. Were the goods in the preceding bill of lading delivered to the S. S. "Eureka"? A. They were.

The bill of lading referred to is offered in evidence. It is marked Libelant's Exhibit 5.

Q. I show you three papers, headed National Carbon Company, dated September 4, 1915, and ask you if you know what those are?

A. Invoices covering the contents and value of cells included in the bill of lading aforementioned.

Q. Were the goods mentioned in those invoices contained in this shipment? A. They were.

Q. Are they a complete statement of all the goods contained in this shipment?

A. Covered by this one bill of lading, yes.

Q. Are the prices or values set forth in those three [6] papers the true market value of the goods referred to in this bill of lading? A. They are.

Q. The market value at what point?

A. New York City or Jersey City.

Q. Was the value at Cleveland any different?

A. Practically the same.

Q. Was the value at the point of destination any different?

A. It would be plus the freight charges, figured at $1.25 per hundred weight. We figure three cents a cell, which is based on a barrel containing 125 dry batteries, and each barrel weighing approximately 300 pounds.

Q. Do the figures given in the quantity column of this invoice previously offered in evidence show the number of cells in the shipment? A. They do.

(Deposition of Anson J. Mitchell.)

Q. And your freight is based upon three cents for each of those cells? A. Yes.

Q. Was a copy of these papers ever given to the Oregon-California Shipping Co., Inc.?

A. They were attached to the original claim papers filed on September 6, 1916.

Q. A true copy? A. A true copy.

The papers referred to, consisting of three invoices, are offered in evidence. They are marked Libelant's Exhibit "4A," "4B" and "4C."

[7] Mr. PLATT.—No objection is interposed to the invoices as such, provided they are hereafter connected up with the claim, but subject to the objection that we will hereafter interpose when the claim itself is offered in evidence.

Q. Mr. Mitchell, the invoices that have been put in contain a correct statement of all the goods in these two bills of lading, don't they and their sound market value? A. Yes.

Q. I show you another paper headed Oregon-California Shipping Co., Inc., and ask you if you know what that is?

A. It covers a shipment originally consisting of 124 barrels of batteries and one box, issued by the Oregon-California Shipping Co., Inc., on which a notation is made of 15 barrels short-shipped, to follow on next steamer. In explanation of this short shipment, I would state that Mr. Bates and Mr. Davis of the Shipping Company advised me that they were unable to locate the 15 barrels at the time of loading the original shipment, and afterwards

(Deposition of Anson J. Mitchell.)

due credit was issued for same.

Q. Is this a bill of lading of part of the goods involved in this action? A. It is.

Q. Were the 15 barrels short-shipped ever delivered to the "Eureka"?

A. No, they were delivered to their agents at Philadelphia, but when they had no other boat, we took [8] them off their hands.

Q. Were these three bills of lading delivered to you by the Oregon-California Shipping Co., Inc., or their agents? A. They were.

Q. Was the freight prepaid on all these goods on the "Eureka"? A. It was.

Q. Were all of these goods shipped from your Cleveland plant? A. Yes, sir.

Q. Were all of the goods delivered to the Oregon-California Shipping Co., Inc., or their agents, at the places and dates stated in these bills of lading?

A. With the exception of the 15 barrels, yes.

The paper referred to is offered in evidence. No objection. It is marked Libelant's Exhibit 5.

Q. I show you another paper headed National Carbon Company, and ask you if you know what that is?

A. Invoice, showing the number of cells and value of cells contained, as covered by the bill of lading just mentioned.

Q. Are the figures set forth in the quantity column the number of cells contained in the shipment?

A. They are.

Q. And are the values set forth the sound market

(Deposition of Anson J. Mitchell.)

values of these goods at New York? A. Yes, sir.

Q. And at Jersey City? A. Yes, sir.

[9] Q. How do they differ from the sound market values at Cleveland and point of destination?

A. Practically the same as at Cleveland but at point of destination we add three cents per cell to cover freight charges.

Q. This is a correct statement of all the goods in this third bill of lading? A. It is.

Q. Was a copy of this invoice delivered to the Oregon-California Shipping Co., Inc.?

A. It was.

Q. State when?

A. With the claim as filed by us on September 6, 1916.

The paper referred to is offered in evidence.

Mr. PLATT.—I have no objection to the offer of the document as an abbreviation of the witness's testimony as to what was shipped, but subject to my objection which will be hereinafter interposed to the claim, when offered, in so far as it is a portion of the claim, or as to its adequacy.

Exception by Mr. Welles.

It is marked Libelant's Exhibit 6.

Q. Did you ever call to the attention of the Oregon-California Shipping Co., Inc., or agents, the quantity, nature and sound market value set forth in these invoices that have been offered in evidence, aside from the claim that you filed with them?

A. Oh, yes; in my visits to [10] New York and Philadelphia on October 9, 1915, I told Mr. Kurtz,

(Deposition of Anson J. Mitchell.)

Mr. Davis and Mr. Bates—in New York I told Mr.—I think his name is English—the nature and character of the goods and their approximate value, which we had on the steamship "Eureka."

Q. Was the freight prepaid to destination on all of these goods? A. It was prepaid to destination.

Q. Have you ever notified the Oregon-California Shipping Co., Inc., of the nature and value of these goods aside from the claim?

A. Yes, at the time of sending them the bills of lading covering the shipments from Cleveland to New York and Philadelphia, I wrote them a letter enclosing the original bill of lading, giving the number of the barrels and boxes, car number, stating to whom they were consigned and the value, advising them that we had prepaid all charges to destination and asked them to send us the ocean bills of lading.

Mr. WELLES.—I call for the original of that letter and of all other letters between the National Carbon Company, and its representatives and the steamship "Eureka," her owners, agents and charterers.

Mr. PLATT.—We have not the letters that counsel calls for.

[11] Q. Have you a copy of that letter?

A. I have copies of them.

Q. Carbon copies of the original letters?

A. Yes.

Q. Is that a duplicate original (showing witness a paper)?

A. This is a duplicate of the original letter I had.

(Deposition of Anson J. Mitchell.)

(By Mr. PLATT.)

Q. Made with one impression of the typewriter keys? A. Yes, sir; at the same time.

(By Mr. WELLES.)

Q. Do these three letters which you have referred to refer to the shipment of goods made on the S. S. "Eureka"? A. They do.

Q. Mentioned in the bills of lading and invoices previously put in? A. They do; yes.

Q. Were these letters actually sent to the persons at the addresses designated? A. Oh, yes.

Mr. WELLES.—I offer these three letters of September 1 and September 7, 1915, in evidence.

Mr. PLATT.—Objected to by the claimant on the ground that the values named in the letters of September 7th do not correspond with the values named in Libelant's Exhibit 4 A, B and C, and Libellant's Exhibit 6.

Exception.

The letters are marked Libellant's Exhibits [12] 7, 8 and 9.

Q. I ask you, Mr. Mitchell, if the car numbers mentioned in these three letters are the correct car numbers of the cars in which the shipment placed on board the S. S. "Eureka" left your plant?

A. Cleveland plant, yes.

Q. How do you explain the apparent discrepancy in the prices given in these three letters and the prices stated in the invoices already in evidence?

A. This is accounted for by the prices in the letters showing that the value was taken on destination

(Deposition of Anson J. Mitchell.)

price instead of New York or Jersey City price, the difference in the two letters consisting of insurance and charges.

Q. Upon what dates did these goods leave your Cleveland factory?

A. On August 31, 1915, we delivered to the New York Central, Cleveland, 116 barrels of these batteries consigned to the National Carbon Company, San Francisco, Cal. September 4, 1915, we delivered to the New York Central at Cleveland, 123 barrels and 12 boxes of these batteries. On September 4, 1915, we delivered to the New York Central at Cleveland, 1 box and 124 barrels of these batteries.

Q. Were these goods in good order and condition when they left your factory at Cleveland?

A. They were.

Q. Were they properly packed?

A. They were.

Q. Did these goods all originate from your Cleveland [13] factory? A. They did.

Q. And were made there? A. They were.

Q. A Mr. Murray is mentioned as the consignee of one lot; that is a consignment of one lot in the bills of lading in evidence; did this Mr. Murray ever own any of these cells? A. No, sir.

Q. Why were they consigned to him?

A. He is our agent, general agent on the Pacific Coast.

Q. Did the title to any of these goods ever leave the National Carbon Company? A. No, sir.

Q. The National Carbon Company, then, were the

(Deposition of Anson J. Mitchell.)

owners of these shipments at all the times mentioned in the pleadings? A. They were.

Q. Was the freight prepaid clear through to the California destination? A. It was.

Q. At the full rate?

A. At the full rate that they asked for, yes.

Q. Did you hear of any difficulty with the Panama Canal at or about this time?

A. From the papers we noticed that there had been a slide in the Panama Canal.

Q. When was this?

A. Well, I think it was about the latter part of September or the first part of October, I don't remember just what date the slide occurred.

Q. Did you communicate with the agents of the steamship with respect to this?

A. On October 1st we wired [14] L. Rubelli's Sons, Philadelphia, asking them to advise the whereabouts of the two steamers which they were agents of, and on both steamers we had various consignments.

Q. Where did you wire from?

A. Cleveland, Ohio.

Mr. WELLES.—I call for the original of this telegram and all other telegrams and messages received by the vessel, her owners, agents and charterers from the libelant or its representatives.

Mr. PLATT.—The claimant states at this time that none of these alleged communications are in its control, or, as far as it knows, in the control of the parties to whom they are addressed; whether or not

(Deposition of Anson J. Mitchell.)

upon the taking of the testimony in Philadelphia of the witness Charles Kurz on behalf of the claimant, the originals can be procured, the claimant cannot at this time state. We have copies of certain letters and telegrams which Rubelli's Sons have furnished us.

Q. Have you a copy of that telegram?

A. I have. I have the copy of the original telegram.

Q. The duplicate original carbon copy?

A. It is.

Q. I show you this carbon copy of a night letter dated Cleveland, October 1, 1915, and ask if that was sent to L. Rubelli's Sons, Philadelphia?

A. It was.

The copy is offered in evidence.

[15] It is marked Libelant's Exhibit 10.

Q. What if any reply did you receive to that?

A. Under date of the 2d Rubelli's Sons replied as per telegram.

Q. I show you another telegram dated Philadelphia, October 2, and ask you if that is a correct copy of the reply received from Rubelli's Sons?

A. It is.

The copy is offered in evidence. It is marked Libelant's Exhibit 11, with the exception of the pencil notations.

Q. Are those pencil notations your own private memoranda? A. They are.

Q. On receipt of this telegram of October 2d what did you do, Mr. Mitchell?

(Deposition of Anson J. Mitchell.)

A. We did nothing until October 8th, then I came to New York and interviewed Phelps Brothers & Company.

Q. Who are Phelps Brothers & Company?

A. New York agents of Rubelli's Sons, act as agents for the Oregon-California Shipping Company.

Q. Are they the agents of this vessel?

A. Yes. After leaving New York I went to Philadelphia and interviewed Mr. Kurz, Mr. Davis and Mr. Bates.

Q. Who was Mr. Bates?

A. Mr. Bates, as I understand, is agent representing the Oregon-California Shipping Company at Philadelphia.

[16] Q. How do you understand he is agent?

A. By signatures to the bills of lading, and also by his saying so.

Q. Who is Mr. Davis?

A. Mr. Davis, I understand, is general freight agent and represents Mr. Kurz of Rubelli's Sons, who are acting as agents for the Oregon-California Shipping Company at Philadelphia.

Q. Are these gentlemen all agents of the S. S. "Eureka" and her charterers, the Oregon-California Shipping Co.? A. That was my understanding.

Q. How did you get that understanding?

A. From conversations with these gentlemen and also from signatures to the bill of lading offered in evidence.

Q. Did they all tell you that they were agents of

(Deposition of Anson J. Mitchell.)

the company? A. Yes.

Q. More than once? A. At various times.

Q. Were they engaged in the business of the ship and its cargo? A. Yes.

Q. They conducted negotiations with you in respect to that? A. They did.

Q. Did they have negotiations with you with respect to the forwarding of this cargo?

A. They did.

Q. After there was delay in transmission?

A. Yes, sir.

Q. Now, on or about October 9th, when you saw these gentlemen in Philadelphia, what took place?

A. I explained to them the detail and character of the goods, and at [17] that time we went into the question as to whether or not it would be advisable, or whether we could take the goods out of the ship. They called their foreman upstairs, and he brought up the loading sheet,—I presume they call it that, I don't know the technical name—but the loading sheet showing where the goods which had been received at Philadelphia had been loaded, in what part of the boat, and I asked for the approximate expense to unload these barrels. I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get

(Deposition of Anson J. Mitchell.)

them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time.

Q. You made a demand for the delivery of the goods at Colon at that time? A. I did.

Q. What did you explain to them was the nature of these goods?

A. I told them that the nature of a dry battery is that after we ship a battery we are supposed to [18] impress upon our people and all dealers that after 90 days or approximately thereto the life of a cell deteriorates or the cell itself deteriorates, and that we would guarantee our batteries to be as good 90 days from the date of shipment as the date of shipment, and we would stand back of and replace any batteries which went bad in that time. Also told them that heat would affect the batteries to such an extent that they would deteriorate very much faster than if kept in a cool place.

Mr. PLATT.—Counsel for claimant moves to strike out all that portion of the answer of the witness which relates to the deterioration of the subject of libelant's shipment on the ground that no liability is shown by the carrier or the vessel, and the same is expressly excepted under Paragraph 3 of the provisions of the bill of lading, printed upon the back thereof, and constituting a contract between the carrier and the libelant, and also under Paragraph 1

(Deposition of Anson J. Mitchell.)

of the provisions of the contract contained within the bill of lading, and also as to any deterioration arising from heat or prolongation of the voyage, or bad weather, accidents of navigation, and depreciation or deterioration due to the inherent character of the commodity under carriage, and under the further and additional provisions [19] of the bill of lading constituting a contract between the libelant and the carrier and the vessel, all testimony with relation to deterioration of the commodity or subject of the shipment by reason of the matters and things covered by which the answers to the last interrogatories are each and all of them incompetent, irrelevant and immaterial.

Mr. WELLES.—Counsel for libelant asks that counsel for the claimant specify under exactly what exceptions and words of the bill of lading the foregoing answer of Mr. Mitchell is objected to.

Mr. PLATT.—Claimant claims that the answer to the last question is incompetent, irrelevant and immaterial under Clause 3 of the bill of lading, providing that no carrier shall be liable for any loss or damage arising from any of the following causes: acts of God, if it shall be hereafter determined by the Court that the slide in the Panama Canal was due to an act of God; no carrier shall be liable for any loss or damage arising from any accident on or perils of the seas or other waters, or of steam or inland navigation. No carrier shall be liable for any loss or damage arising from detention or accidental delay. No carrier shall be liable for any loss or dam-

(Deposition of Anson J. Mitchell.)

age [20] due to dampness, loss in weight, sweat, evaporation, heat, natural decay or exposure to the weather.

Under paragraph 1 of the bill of lading it is provided "it is mutually agreed that the carrier shall not be liable for loss or damage caused by causes beyond its control or accidents of navigation, of whatsoever kind."

The carrier shall not be liable for loss or damage or to change of character of shipment or for any loss or damage arising from the nature of the goods, nor for any loss or damage caused by the prolongation of the voyage, and in the 8th paragraph of the bill of lading "when the delivery is prevented in consequence of weather * * * strikes, troubles * * * and all analogus circumstances whatsoever * * * the carrier is exempted from loss or damage," all of which provisions constitute a contract between the libelant and the carrier and the steamship, the benefit of all of which the claimant at this time claims as in its answer set forth.

Mr. WELLES.—Libelant asks that all of the objections of the claimant above stated to the answer to the last question be overruled and stricken out as it is not shown that the damage [21] was due to any of the causes stated by claimant in his objections, and that the said objections are too indefinite and uncertain, and constitute in part conclusions not warranted by the evidence.

Q. Were these goods delivered to you, in response to your request made to these agents at Philadelphia,

(Deposition of Anson J. Mitchell.)

at Colon? A. No, they were not.

Q. Did they refuse to deliver them?

A. They did.

Q. Why did you want the goods at Colon at that time?

A. In order to save any damage that might happen to the goods and because we needed the goods badly in order to ship our customers' orders.

Q. Did you expect to use them at Colon?

A. Either to transship them to San Francisco or back to New York or Jersey City.

Q. Did the "Eureka" or her agents offer to transship them or to send them forward?

A. They did not.

Q. Did they offer to deliver them back to the point of shipment?

Mr. PLATT.—I object to this question as immaterial, on the ground that that is not the contract under which the carrier is operating.

Mr. WELLES.—Exception to objection is reserved.

A. They did not.

[22] Q. What, if anything, did they offer to do with the goods? A. At that time?

Q. Yes.

A. I could not get any information from them at all, except that the Rubelli people told me that they were doing everything in their power to get the executors of the Oregon-California Shipping Co.—the managers—to transship the goods or to do something with them in order to satisfy the demands made

(Deposition of Anson J. Mitchell.)

on them by the various consignors.

Q. Did they state that they had been advised of the "Eureka's" arrival at Colon?

A. I can't remember.

Q. Did they tell you whether they knew she was there or not?

A. Yes, they told me she was there, and they even told me that they had cabled contrary instructions themselves—cabled instructions to the captain contrary to the instructions issued by the Oregon-California Shipping Company.

Mr. WELLES.—Libelant calls for the original or correct copies of the cables mentioned. Libelant also calls for a copy of the stowage plan mentioned by Mr. Mitchell.

Mr. PLATT.—None of those documents are in the possession or under the control of the claimant; whether they can be procured in connection with the testimony of the witness Charles Kurz, which is to be taken at a later date, of course I cannot at this [23] time state.

Mr. WELLES.—Libelant calls attention to the fact that the stowage plan and the other documents previously referred to, are shown to be within the possession of the agents for the vessel.

Mr. PLATT.—Claimant states that as the present owner of the vessel, and defending this suit, none of these documents are under its control. It has no connection with the Oregon-California Shipping Company or any of its agents, and up to date has not been able to procure any of the documents referred

(Deposition of Anson J. Mitchell.)

to, if they are in existence or if they are not in existence.

Q. Did you offer at this time to go down to Panama and take delivery of the goods there? A. I did.

Q. Was that offer accepted? A. It was not.

Q. Were the goods delivered at Colon or any near-by point? A. No, sir.

Q. Where were they delivered?

A. New Orleans.

Q. Were there other vessels carrying goods from Colon to United States ports at about this time?

A. There were.

Q. If those goods had been unloaded at Colon could they have been brought to the United States by other routes?

Mr. PLATT.—Objected to on the ground that the witness has not shown that he knows anything about [24] that.

A. They could have been.

Q. As traffic manager of the National Carbon Company you are familiar with the methods of shipping goods from Colon to the States by various routes?

A. Very conversant with them.

Q. Were you at this time? A. Yes, sir.

Q. Was this information communicated to the main office of the Oregon-California Shipping Company by Rubelli's Sons, the fact that you had taken up this question of delivery at Colon? A. Yes, sir.

Q. How was it communicated?

A. By telegrams.

Q. I show you a copy of a telegram dated October

(Deposition of Anson J. Mitchell.)

18, 1915, from Rubelli's Sons to the Oregon-California Shipping Company, Portland, Oregon, and ask you if that is one of the telegrams?

A. That was given me by the agents of the Oregon-California Shipping Company in Philadelphia as being a true copy of the telegram they had sent to the Oregon-California Shipping Company, at Portland, Oregon, in reference to our shipment.

The telegram is offered in evidence.

Mr. PLATT.—No objection to the form, but objected to as incompetent to bind the vessel on the ground that the terms of carriage are defined by the bill of lading, and that the consignor of a [25] portion of the shipment had no legal right to require the ship to discharge the cargo or a portion of it at the point designated by him, but that the carrier's obligations, as well as its rights as to the disposition of the goods under the circumstances as developed at the Panama Canal, are defined by the bill of lading, and that the ship performed its legal obligations under that bill of lading; and on the further ground that the instrument offered in evidence is immaterial because it has been heretofore testified by the witness that the libelant accepted delivery of the goods at the port of New Orleans, and any negotiations or exchange of letters or telegrams or oral representations of the negotiations as to discharge at some other point are incompetent, irrelevant and immaterial at this time.

Mr. WELLES.—Libelant moves to strike out this objection as incompetent, irrelevant and immaterial,

(Deposition of Anson J. Mitchell.)

and consisting of conclusions not based upon facts in evidence.

Q. The agents of the steamship company admitted to you that they had sent this telegram to the Oregon-California Shipping Company, did they not?

A. They did, and gave me that copy, which was made in their office.

Q. With respect to your particular cargo?

A. Yes.

[26] The copy of telegram is marked Libelant's Exhibit 12.

Q. Do you know whether Rubelli's Sons sent any other message to the Oregon-California Shipping Company in reference to this, about this time?

A. I do; they gave me a copy of another telegram which they had sent, which is here now.

Q. I show you a copy of a telegram and ask you if this is the copy of the other telegram which they gave you? A. It is.

Q. Did they state that as agents of the S. S. "Eureka" they had sent this message to the Oregon-California Shipping Company? A. They did.

The copy is offered in evidence.

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial for the reasons stated as objections to Libelant's Exhibit 12, and for the further reason that the same does not purport to be an original telegram produced from the custody of either the sender or the receiver, and no showing has been made as to why the original is not produced, and on the further ground that the same is not properly and

(Deposition of Anson J. Mitchell.)

legally identified as having been sent, but is only a hearsay statement to the witness as to what was told him, [27] and there is no showing that the same was ever received by the party named as the receiver of the message, and the vessel, under the circumstances, cannot be bound.

Exception.

The copy is marked Libelant's Exhibit 13.

Mr. WELLES.—Libelant submits that the telegram is competent as an admission by the agents of the vessel. Libelant offers to connect up all copies of correspondence and other documents offered in evidence, if not already pertinent.

Libelant calls for the offer of the 14th referred to in the last mentioned telegram dated October 19, 1915.

Q. Have you, in your possession or control, the originals of these last two telegrams offered in evidence? A. No, I have not.

Q. Do you know where they are?

A. Presumably with L. Rubelli's Sons in Philadelphia, because these copies were handed to me by the agent of L. Rubelli's Sons at Philadelphia.

Mr. WELLES.—I call for the originals of those telegrams.

Mr. PLATT.—Neither the originals nor copies [28] of the telegrams purported to be covered by Libelant's Exhibits 12 and 13 are in the custody or control of the claimant. I move to strike out the answer of the witness on the same grounds as hereto-

(Deposition of Anson J. Mitchell.)

fore interposed to Libelant's Exhibit 13.

Exception.

Q. Did you take up this question of delivery or landing goods further with the agents of the vessel?

A. At this one conversation or later?

Q. Later? A. Yes.

Q. Give me the date.

A. On October 14th by long distance telephone.

Q. When after that?

A. On October 16th called them on long distance telephone; Mr. Davis advised me at that time of the arrangement which they were anticipating putting through in order to have the goods unloaded at Panama.

Q. What arrangement?

A. That is covered by their circular, afterwards issued under date of October 22.

Q. Was anything said by them at any of these conferences about being able to get the vessel through the Panama Canal or that they hoped to be able to get her through the canal?

A. I don't remember them saying anything about that.

Q. Do you recall that they ever mentioned to you any hopes of being able to get the vessel through the canal and on to destination?

A. Yes, I remember that they did tell me that they had received a cablegram from the [29] captain, the captain of this boat, stating it as his opinion, or someone else's opinion there, that it would be a long time before the slide—or the canal would be open;

(Deposition of Anson J. Mitchell.)

they also told me that they had got in touch with Colonel Goethals and he or his office—no, no, that was not it,— these Rubelli people—it was not Colonel Goethals, some person in charge of the canal, and was informed by them that it would be a long time before the boats could get through.

Mr. WELLES.—We call for all the cables, messages or telegrams referred to by the witness with respect to the condition of the canal and the chances of getting through received from the captain or the canal authorities by the agents of the vessel, and their replies.

Mr. PLATT.—The originals of any documents or messages between the captain of the vessel and the Oregon-California Shipping Co., Inc., if any, of which counsel cannot positively speak, except from memory at this time, are in evidence in the case now pending in the District Court of the United States for the Southern District of Louisiana wherein the Crossett Western Lumber Company is libelant and the Oregon-California Shipping Co., Inc., and others are defendants, so that as to those originals, if any, counsel cannot without a demand for [30] much longer time than has been made, respond. The captain of the vessel also will be a witness for the claimant on the 18th instant, when opportunity will be had to interrogate him as to what, if any, messages he sent on this subject.

Q. Did you afterwards receive any statement of what the plan was to have the goods unloaded and

(Deposition of Anson J. Mitchell.)

the expense of shipment apportioned among the shippers?

A. I did; confirming the conversation over the 'phone I was sent the circular herewith, covering the plan in detail. In the circular you will notice my name is mentioned as having approved and agreed to said plan.

Q. Had you approved and agreed?

A. I had.

Q. I ask you if this circular which you have shown me is a correct copy of the circular put out by Rubelli's Sons? A. This is the one I received.

Q. From Rubelli's Sons?

A. From Rubelli's Sons.

Q. Acting as agents for the vessel? A. Yes.

Mr. PLATT.—Objected to on the ground that the witness is not competent to state whether or not the document which is now about to be offered in evidence, and about which he has been interrogated, was issued with the knowledge and authority of the Oregon-California Shipping Co., Inc.; therefore that the same is incompetent; that [31] the inquiry is incompetent.

Mr. WELLES.—We except to the objection, and submit that the circular is competent, among other reasons, as a statement of the agents of the vessel with respect to the business of the vessel and her movements. I offer it in evidence.

Mr. PLATT.—Objected to on the part of the claimant on the ground that the document in question in its language expressly states that the propo-

(Deposition of Anson J. Mitchell.)

sitions therein contained are made without any authority or responsibility whatsoever as far as the steamship "Eureka" is concerned, or as far as its owners or charterers or the Oregon-California Shipping Co., Inc., are concerned; that it is plainly and on its face an attempt on the part of Rubelli's Sons, the issuers of the circular, to promote a new steamship company and to sell stock thereunder by an ingenious device therein contained, and has nothing whatever to do with this case or with the parties to the case, and is wholly, for the reasons stated, incompetent, irrelevant and immaterial to bind either the steamship "Eureka" or the claimant.

Mr. WELLES.—I take an exception to the objection on the ground that it is incompetent, irrelevant **[32]** and immaterial and based largely upon conclusions unsupported by evidence.

The circular is marked Libelant's Exhibit 14.

Q. Was that proposed arrangement ever carried out? A. It was not.

Mr. PLATT.—Claimant now moves to strike out Exhibit 14, if it be admitted over the objection heretofore made at the time of the offer, on the ground that it is, in view of the answer of the witness to the last question, that the arrangement therein set forth was never carried out, incompetent, irrelevant and immaterial in this case for any purpose whatsoever.

Exception.

Q. Was this voyage ever performed by the "Eureka" to California? A. No.

(Deposition of Anson J. Mitchell.)

Q. Pursuant to your bills of lading?

A. No, sir.

Q. Did you call them up about October 19th with reference to this vessel?

A. I did, and insisted that something be done immediately in order to have the goods turned over to us.

Q. Did you give them any notice at that time that there would be any claim for damage to these goods?

A. Yes, I made several demands. I made a demand on Rubelli's Sons for the goods and told them that unless **[33]** they would be turned over immediately that the damages would be more than what they were at the present.

Q. About what date was that demand made?

A. This first demand I think was on October 9th, 1915, the first demand that I made, and told them about the damage.

(By Mr. PLATT.)

Q. Was that oral or written?

A. Oral, in their office.

(By Mr. WELLES.)

Q. What did they say in response to your oral demand as to damage at that time?

A. Well, I can't remember just the words they used, but after I explained to them all about the goods and everything about it they said well they realized that they were in for damage claims.

Q. Did they say that they would not consider your claim or reject it at that time? A. Oh, no.

Q. Did they ever tell you they would not consider

(Deposition of Anson J. Mitchell.)

your claim as orally demanded, or would reject it?

A. Always stated that my claim would be given proper attention and also due consideration, not only by Rubelli's Sons but by Mr. Williams in person at New Orleans at the time we were unloading the boat.

Mr. PLATT.—Claimant moves to strike out all testimony of the witness both in answer to the last interrogatory and the one immediately preceding it, and any other wherein he is testifying [34] concerning oral claims or demands for damages on the ground or for the reason that the same is incompetent, as it is provided under section 6 of the bill of lading that all claims for damages must be in writing.

Mr. WELLES.—Libelant excepts and submits that the evidence is competent as tending to show a waiver of the terms of the bill of lading with respect to written claims.

Mr. PLATT.—In answer to the exception claimant states that no agent has authority to waive the provisions of the bill of lading without express authority from his principal.

Mr. WELLES.—The statement is excepted to as unsupported by any evidence.

Adjourned to 1:30 P. M.

(Deposition of Anson J. Mitchell.)

[35] 1:30 P. M.

After recess.

Present as before.

Examination of ANSON J. MITCHELL continued.

(By Mr. WELLES.)

Q. Did you have any talk with any one besides Mr. Davis and Mr. Kurz and Mr. Bates about this?

A. About the damage you mean?

Q. About the damage and the forwarding of these goods and whether the voyage was going to be completed?

A. Yes, of course I had a little talk with this man, here in New York, but it was chiefly with the owners in Philadelphia.

Q. Who was that in New York?

A. Mr. English, I think his name is.

Q. Of Phelps Brothers & Company?

A. Of Phelps Brothers & Company.

Q. Are Phelps Brothers & Company agents for this steamship here?

A. If I remember they advised me that they were appointed by the Rubelli Company to represent them in New York City.

Q. But you transacted your business in New York with respect to this steamship with Phelps Brothers & Company? A. Yes.

Q. And they were then engaged in the business of this **[36]** steamship, were they? A. Yes, sir.

Q. Is that the same Mr. English that signed the bill of lading, Libelant's Exhibit 1? A. Yes, sir.

(Deposition of Anson J. Mitchell.)

your claim as orally demanded, or would reject it?

A. Always stated that my claim would be given proper attention and also due consideration, not only by Rubelli's Sons but by Mr. Williams in person at New Orleans at the time we were unloading the boat.

Mr. PLATT.—Claimant moves to strike out all testimony of the witness both in answer to the last interrogatory and the one immediately preceding it, and any other wherein he is testifying [34] concerning oral claims or demands for damages on the ground or for the reason that the same is incompetent, as it is provided under section 6 of the bill of lading that all claims for damages must be in writing.

Mr. WELLES.—Libelant excepts and submits that the evidence is competent as tending to show a waiver of the terms of the bill of lading with respect to written claims.

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Adjourned to 1:30 P. M.

(Deposition of Anson J. Mitchell.)

[35] 1:30 P. M.

After recess.

Present as before.

Examination of ANSON J. MITCHELL continued.

(By Mr. WELLES.)

Q. Did you have any talk with any one besides Mr. Davis and Mr. Kurz and Mr. Bates about this?

A. About the damage you mean?

Q. About the damage and the forwarding of these goods and whether the voyage was going to be completed?

A. Yes, of course I had a little talk with this man, here in New York, but it was chiefly with the owners in Philadelphia.

Q. Who was that in New York?

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Q. Of Phelps Brothers & Company?

A. Of Phelps Brothers & Company.

Q. Are Phelps Brothers & Company agents for this steamship here?

A. If I remember they advised me that they were appointed by the Rubelli Company to represent them in New York City.

Q. But you transacted your business in New York with respect to this steamship with Phelps Brothers & Company? A. Yes.

Q. And they were then engaged in the business of this **[36]** steamship, were they? A. Yes, sir.

Q. Is that the same Mr. English that signed the bill of lading, Libelant's Exhibit 1? A. Yes, sir.

(Deposition of Anson J. Mitchell.)

Q. I show you a letter from Phelps Brothers & Company dated October 9, 1915, and ask you if that is a letter received by you from them with reference to this shipment (handing witness paper)?

A. It is, in which they enclosed the bills of lading for the car of batteries shipped from New York.

Q. Did that letter enclose the two bills of lading that have been put in evidence?

A. No, it enclosed one of the bills of lading.

Q. It enclosed the bill of lading, Libelant's Exhibit 1, that has been put in evidence? A. Yes.

The letter referred to is offered in evidence.

No objection.

It is marked Libelant's Exhibit 15.

Q. I show you a second letter from Phelps Brothers & Company dated September 11, 1915, enclosing bills for freight, and ask you if you received that letter from them with reference to this shipment?

A. We did.

Q. Were the freight bills enclosed at the rates therein stated? A. They were.

Q. Were those bills paid? A. They were.

The letter referred to is offered in evidence. [37]

It is marked Libelant's Exhibit 16.

Q. Did those bills include the freight to the California destination? A. They did.

Q. I show you copy of a telegram to the Oregon-California Shipping Company dated October 25, 1915, and ask you if that is a duplicate carbon original of a telegram sent on that date in connection with this shipment (handing witness paper)?

A. It is.

(Deposition of Anson J. Mitchell.)

The copy of telegram referred to is offered in evidence.

Mr. PLATT.—The telegram submitted is objected to as incompetent to predicate damages, as it does not proceed in accordance with the provisions of the bill of lading, in that it is merely a warning that damages may flow, and is not a written statement of damage following ten days of the receipt of the shipment with regard to the terms of the bill of lading. Objected to at this time as incompetent on the further ground that it contains a reference to another writing by an earlier date which has not yet been introduced in evidence, and which is necessary to ascertain what is the legal force and effect of this instrument, to wit, the proposition alleged to have been forwarded by libelant to the Oregon-California Shipping Company [38] under date of 14th of October, 1915.

Mr. WELLES.—Exception.

It is marked Libelant's Exhibit 17.

Libelant also wishes it noted that any of the exhibits which may not be pertinent at the time when offered libelant expects to connect up by the evidence of this and other witnesses.

Q. Have you in your possession or under your control this telegram Rubelli wired on the 14th, which is referred to in the exhibit just mentioned?

A. I have not.

Q. Do you know what the contents of that proposition were?

A. I was advised and I was shown a telegram

(Deposition of Anson J. Mitchell.)

while in Mr. Davis's office which they had sent to the Oregon-California Shipping Company, and the gist of the telegram is practically the same as the proposition in the circular issued by the Rubelli Company, offered in evidence above.

Mr. PLATT.—I move to strike out the answer of the witness, on the ground that it is hearsay and consequently incompetent.

Mr. WELLES.—Exception. I call for the production of the telegram sent by Rubelli to the Oregon-California Shipping Company, to which the National Carbon Company informed Rubelli they would agree.

Mr. PLATT.—Claimant again advises libelant [39] that it has no documents of the Oregon-California Shipping Company, and as far as it knows any such documents, if they were ever in existence, are still in the possession of the Oregon-California Shipping Company and open to libelant to obtain in the method provided for by law and the practice in admiralty. The demand, therefore, is idle to be made upon the claimant.

Exception.

Q. I show you a copy of a telegram from F. H. Murray dated December 25, 1915, and ask you if you received that telegram? A. I did.

Q. Is this the carbon copy (handing witness paper)?

A. That is the original copy received by the operator.

(Deposition of Anson J. Mitchell.)

The copy of telegram referred to is offered in evidence.

No objection.

It is marked Libelant's Exhibit 18.

Q. What conversation or communications have you had with the agents of the vessel with respect to sending the vessel forward by way of the Straits of Magellan; tell me all that you did about that Magellan business?

A. As soon as I learned that they were figuring on a shipment by way of the Straits of Magellan I objected.

Q. When did you first learn that?

A. I cannot remember **[40]** the date, but I know that it was prior to October 18.

Q. How far prior do you think it was, was it on the 9th that you first took up that question?

A. I cannot tell you, just prior to the 18th.

Q. Who had proposed that the goods would be sent by the Straits of Magellan?

A. The Rubelli people told me that they had information—if I remember correctly they told me they had information from the captain that he had been ordered via the Straits of Magellan, or were trying to arrange, see if he could arrange to go that way, but the captain had advised them that owing to her being an oil burner it would be practically impossible for him to get fuel, and that would make it impracticable to go that way.

Q. Did you object to your goods going by way of the Straits of Magellan? A. I did.

(Deposition of Anson J. Mitchell.)

Q. Why did you do that, for what reason did you object to your goods going that way?

A. Because we made a demand for the goods at Colon knowing that we could get rid of them quicker and easier after taking delivery at Colon, and also the further fact that the long voyage around by way of Magellan would naturally tend to make the batteries what we call seconds instead of first-class cells.

Q. You ship a great many batteries around by way of the Canal to California, do you not?

A. We did; we are not doing it now.

[41] Q. Did those batteries show any depreciation on reaching California?

A. None, practically, whatever.

Q. Had you received any reports from your consignees for objecting to the condition in which they arrived on the usual voyages?

Mr. PLATT.—Objected to on the ground that it is immaterial what happened to other shipments.

Exception.

A. No.

Q. Were these batteries such as were capable of standing the ordinary journey to California without depreciation? A. Yes.

Q. If they were properly stowed and handled how long would it be before they would show depreciation?

A. Well, I should say—we have had them on boats—

Q. I mean under ordinary circumstances how long

(Deposition of Anson J. Mitchell.)

would you figure before they would show depreciation?

A. Between 60 and 90 days, anywheres along there it would be, it would be 90 days any way. We are shipping to the Philippine Islands and all over the country and they have had no trouble at all.

Q. And the batteries on arrival are always sold as first-class goods? A. Yes.

Q. Did these batteries ever generate any heat by themselves without any exterior heat?

A. No, no heat.

[42] Q. Then it always requires exterior heat, does it, for them to show any depreciation from that cause? A. From heat, yes.

Q. I show you a copy of a telegram dated October 26–27, 1915, from the Oregon-California Shipping Company, and ask you if that is a correct copy of the telegram received on that date (handing witness paper)?

A. That is an original copy of the telegram.

Q. Did you say original copy; was this the telegram you got?

A. We have an operator, in fact we have two operators in our department; that is the copy that she took over the wire, that is the original telegram.

The telegram referred to is offered in evidence. It is marked Libelant's Exhibit 19.

Q. I show you a day-letter dated October 27, 1915, to the Oregon-California Shipping Company, and ask you if that is a correct copy of message sent on that day? A. It is.

(Deposition of Anson J. Mitchell.)

The copy of day-letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, as being a self-serving declaration on the part of the libelant and an attempt on its part to dictate the transshipment, whereas clauses 1, 2 and 8 of the bill of lading provide under what circumstances and by whom and how the carrier has the right of transshipment [43] in case of the happening of the several conditions precedent to that right, one of which was the condition precedent which has already been detailed in evidence by the witness, and that the instrument offered is immaterial and irrelevant for the same reason, as it is incompetent.

Mr. WELLES.—Exception. We ask that your objection be made more specific.

It is marked Libelant's Exhibit 20.

Q. After your telephone conversation on October 19 did you go to Philadelphia?

A. I did; I arrived there the morning of October 22.

Q. What occurred?

A. I met Mr. Davis and Mr. Bates and had quite a talk with them. Mr. Davis and Mr. Bates both asked that I simply wait until Mr. Kurz, who was at that time in New York, returned, so I stayed over until the following day and then went to the office and detailed to them, told them what I was willing to do, told them that I was willing to take delivery down at Colon and that we would pay the expenses of the unloading of the freight and putting the other freight back into the ship, and take actual delivery

(Deposition of Anson J. Mitchell.)

at the dock, delivery of the goods at Colon.

Q. You offered to pay all expenses they might be put to in order to get your delivery? A. I did.

[44] Q. Did they agree to give you any delivery at Colon? A. They would not.

Q. Did they refuse?

A. They stated they could not.

Q. Did they state why they could not?

A. They stated they had put the matter up to their people at Portland and they could not get them to agree. They thought my proposition was more than fair.

Q. I show you a letter to Rubelli's Sons dated October 27, 1915, and ask if that is a carbon duplicate of a letter sent by you on that day (handing witness paper)? A. It is.

Q. Including the wording on the back?

A. It is.

The copy of letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, in that it is an attempt on the part of the libelant to dictate the transshipment and to inhibit the carrier from transshipment except upon libelant's price as named in the instrument now offered in evidence, in violation of the terms of Paragraph 8 of the conditions of the bill of lading, which provide that when the delivery of cargo by the carrier is prevented in consequence of a condition such as has been testified to by the witness as existing at the Canal, the captain or the com-

(Deposition of Anson J. Mitchell.)

pany (meaning by the company the carrier [45] operating the vessel) is entitled to transship whether the terminus of the voyage or not has been arrived at, and all risks whatsoever and all expenses of transshipment and all extra expenses of whatsoever kind incurred shall be entirely for the account of the shipper, consignee or party claiming the goods.

Exception.

It is marked Libelant's Exhibit 21.

Q. Did you receive any reply to this letter?

A. No, sir.

Q. I show you a copy of a telegram to Rubelli's Sons dated November 3, and ask you if that is a correct copy of the telegram sent by you to them on that date (handing witness paper)? A. It is.

The copy of telegram referred to is offered in evidence. It is marked Libelant's Exhibit 22.

Q. I show you a day-letter dated November 3, addressed to the Oregon-California Shipping Company, and ask you if that is a correct copy of the message sent to them on that date? A. It is.

The day-letter is offered in evidence. It is marked Libelant's Exhibit 23.

Q. I show you a copy of a telegram dated November 3, 1915, and ask you if that is a correct copy of a telegram received by you on that date?

A. It is.

[46] The telegram is offered in evidence. It is marked Libelant's Exhibit 24.

Q. I show you a copy of a day-letter dated November 4, 1915, to the Oregon-California Shipping Com-

(Deposition of Anson J. Mitchell.)

pany, and ask you if that is a correct copy of the message sent to them on that date? A. It is.

The copy of day-letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, the filing of the claim for damages not being in accordance with Paragraph 6 of the conditions of the bill of lading, requiring that claims for damages be presented to the carrier within 10 days after actual delivery to the consignor or consignee, it being a matter of pleading in the libel that delivery was had by the carrier and accepted by the libelant on November 22 and November 23, 1915.

Exception.

The day-letter is marked Libelant's Exhibit 25.

Q. I show you a telegram dated November 5th, 1915, signed Charles Kurz, and ask you if that is a correct copy of a day-letter received by you on that date? A. Yes.

The telegram is offered in evidence. It is marked Libelant's Exhibit 26.

[47] Q. I show you a copy of a day-letter dated November 5th, to the Oregon-California Shipping Company and ask you if that is a correct copy of a message sent to them on that date? A. It is.

The copy of day-letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, as a claim for damages under Article 6 of the conditions of the bill of lading, in that it was not made within 10 days of the actual delivery to and receipt by the libelant of the subject matter of the shipment, which

(Deposition of Anson J. Mitchell.)
was delivered and received on November 22 and November 23, 1915.

Exception.

The copy of day-letter is marked Libelant's Exhibit 27.

Q. After you sent that message, what did you do, Mr. Mitchell?

A. I heard nothing from Rubelli, and called them up on the long distance 'phone asking them to let me know what they knew. They told me that they had been informed by—that the boat had left for New Orleans on or about November 6th, but that the cargo would be transshipped, and that Mr. Kurz or Mr. Williams, manager of the Oregon-California Shipping Company, would communicate with us.

Q. Did they tell you that Mr. Williams was the manager [48] of the Oregon-California Shipping Company? A. They did.

Q. Had you had any other information that the vessel was going to New Orleans?

A. That was the first definite information I had.

Q. Had you been consulted at all as to her going to New Orleans before this?

A. I am wrong there, I wish to correct my statement, on October 25th we received a telegram through Mr. Murray, that they were going to divert the ship to New Orleans.

Q. Had you consented to that diversion?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial on the ground that Sections 1, 2 and 8 give the carrier the right of diversion and

(Deposition of Anson J. Mitchell.)

transshipment under a state of facts such as the witness has already testified to at the Panama Canal, and that the consent of the consignor or consignee under such circumstances is not a condition precedent to the right of transshipment.

Exception.

A. No, except that on October 27th I wired them as per my day-letter of October 27th (referring to exhibit 20).

Q. Aside from this message had you given any consent to the boat going to New Orleans?

Mr. PLATT.—Same objection as to the last preceding [49] question.

Exception.

A. I don't think I did; I am quite sure I didn't.

Q. After this telephone conversation of November 8th, what did you do?

A. I heard nothing from them, and called Rubelli's Sons up again on the wire on the morning of the 11th, and was told that Mr. Kurz, accompanied by one of the managers,—I think he said managers, one of the big bugs,—one of the managers, would be in Chicago on the way to New Orleans, and that I should get in touch with them if I wanted to see them. Mr. Kurz would be in Chicago on the 12th.

Q. I show you a telegram dated November 11th, 1915, and ask you if that is a correct copy of the message sent by you to Mr. Kurz on that date?

A. It is.

The copy of telegram is offered in evidence. It is marked Libelant's Exhibit 28.

(Deposition of Anson J. Mitchell.)

Q. I show you a message dated November 11, 1915, signed John Dwyer, and ask you if that is a correct copy of the message received by you on that date?

A. It is the original copy.

The telegram is offered in evidence.

Q. When you say original copy, do you mean the copy received by your own telegrapher at the Cleveland plant? A. Yes.

[50] Q. Were all the messages in connection with this matter addressed to you at the Cleveland plant and received by your own telegrapher there?

A. Addressed to me at the Cleveland plant, yes.

The telegram is marked Libelant's Exhibit 29.

Q. Who is the Mr. Dwyer who signed this message?

A. He is the agent for Phelps Brothers at Chicago, who are acting as agents for Rubelli's Sons.

Q. Did Rubelli's Sons or Phelps Brothers ever tell you that he was their agent?

A. Yes, and I think their letter-heads show that. I have been in their office several times—called a number of times.

Q. Whose letter-heads? A. Mr. Dwyer's.

Q. Have you any of those here? A. No.

Q. I show you a message dated November 11, 1915, addressed to Mr. Dwyer and ask you if that is a correct copy of the message sent on that date?

A. It is.

The telegram is offered in evidence. It is marked Libelant's Exhibit 30.

Q. What did you do after these messages?

(Deposition of Anson J. Mitchell.)

A. I got on the train, went to Chicago, met Mr. Kurz and Mr. Williams, went with them to New Orleans. I stopped off at Memphis, of course, but we both went to New Orleans. I stopped off at Memphis a day.

Q. What did you find at New Orleans?

A. I found that [51] the boat "Eureka" had arrived there, and that some of our goods, a very few, were unloaded. No, I beg your pardon, they were not unloaded then; I found that the steamship "Eureka" had arrived there, but our goods were not unloaded until Tuesday or Wednesday, and the balance was unloaded November 22 and 23, 1915.

Q. Did you see your goods there? A. I did.

Q. Were they the same goods which had been shipped from your Cleveland factory?

A. They were.

Q. Did you see them being unloaded from the vessel?

A. I did see some of them, not all of them,

Q. Did you examine them? A. I did.

Q. What did you find?

A. I found quite a number of the barrels were broken open and after I made a test as to amperage and voltage, seeing the condition of the goods, I decided that they were not in a condition to ship out to our customers, so I immediately endeavored to make arrangements with the railroad company, and did succeed, in order to get the goods sent back to Jersey City.

Q. How many of the barrels were broken, what

(Deposition of Anson J. Mitchell.)

portion of the barrels were broken, quarter or half or what?

A. Ten or fifteen per cent were broken.

Q. Were any of them crushed in?

A. Yes, some were crushed in, I don't want to say it was ten or fifteen per cent, perhaps it was; well, it was in the neighborhood [52] of 10 per cent.

Q. What was the nature of the damage to the batteries?

Mr. PLATT.—Objected to on the ground that any proof of damage in compliance with the terms of Article 6 of the conditions in the bill of lading, unless it be expressed in writing and delivered to the carrier within 10 days after the goods are actually delivered to the consignor or consignee, is valueless, and for these reasons the answer to the inquiry as formed is incompetent, irrelevant and immaterial.

Exception.

A. The batteries showed that they had been subjected, as far as I could distinguish, to extreme heat, I presume that we could offer more of a scientific reason why, by our chemist, whom I can bring over here, but to my mind, and I have inspected hundreds of shipments, the batteries were not what we would term first class. A great number of them that I tested I found the amperage running lower than what they should, and also the seal on the cell showed the imprints of the straw, which tended to show, of course, that the heat had been excessive, and naturally began to melt the wax. This seal is nothing

(Deposition of Anson J. Mitchell.)

more or less than a composition of sealing wax, pitch and tar.

Mr. PLATT.—Claimant moves to strike out [53] answer of the witness above for the reasons and on the grounds heretofore urged as to its admissibility, and also on the further ground that the damage as detailed by the witness in his completed answer is excepted under Clauses 1, 2, 3 and 8 of the bill of lading as heretofore detailed at length by counsel for claimant in answer to the request of counsel for the libelant, and for all of those reasons it is incompetent, irrelevant and immaterial.

Mr. WELLES.—Exception on the ground that the objection is incompetent, irrelevant and immaterial, among other reasons because it does not appear that the circumstances of the present case are within the exceptions of the bill of lading, or that the paragraphs referred to are applicable.

Q. Could you judge from what you saw of the batteries at New Orleans whether the heat that had caused the damage had arisen from within the goods themselves, or from exterior sources?

Mr. PLATT.—Objected to on the same grounds as those to the next preceding interrogatory.

Exception.

A. I could not say technically, but judging from my experience—I can explain that this way, if any heat [54] comes, or if any damage is sustained through the cell of itself, it will begin to corrode and show up around on the zinc, which is the container. Of all the cells that I examined at that time none

(Deposition of Anson J. Mitchell.)

showed this corroding, though all showed an apparent outside damage, or in other words, the damage was sustained from causes outside of the cell and not of the cell itself.

Mr. PLATT.—I move to strike out the answer of the witness for the same reasons as to the answer to the preceding interrogatory.

Exception.

Q. Had you ever seen any cells which might heat up themselves sufficiently to soften the wax under the circumstances in which these cells were?

A. Not from the word heat, but I have seen cells which analysis showed had some foreign material, such as iron, and that would create what is termed an excitement; those would have this corroding.

Q. Would they show any melting of the seals?

A. No, they would not show any melting of the seals.

Q. Have you seen any batteries which showed a melting of the seals due to causes within the batteries themselves? A. No, I never have seen any.

Q. Will you state briefly how these cells were packed?

A. Yes, they were all—do you mean after they came [55] from the testing room?

Q. How these cells were packed?

A. They take an empty barrel and place a layer of straw in it, pack it down very securely, then we take a number of batteries, as many as will go in a barrel, as one layer. Then straw is taken and forced between the batteries and the barrel, inside of the bar-

(Deposition of Anson J. Mitchell.)

rel, then another layer of straw is placed on top of that, and the same process followed until we have three layers of batteries in one barrel, with cushions, of course, in the top and bottom and between and also around the sides, of straw.

Q. The barrels are filled that way and a head put on, is that right?

A. The barrels are filled and the head is put on and properly marked.

Q. Is there anything put around the cell itself?

A. Well, there is a paper of jacket which is used as advertising matter and also to keep the zinc from coming in contact with another sell or other metallic substance.

Q. Is that of paper or carboard?

A. Cardboard, chip board is what it really is.

Q. How are these cells made up, what is the construction of one of them?

A. We first make a container 2½ inches in diameter by 6 inches high of sheet zinc, 8 or 9 gauge or whatever we want, according to the kind of cell we wish. [56] This can is then taken and placed in what is termed a pocket or cart, and taken to where a paper lining is placed within the can. It is then taken to what is termed a tamping machine. At this tamping machine they place a carbon stick in the center of the can and force the constituent elements of the mix, which usually consists of manganese ore, carbon flour and a few other secret ingredients, around it; this mix is fed into the can, and by machinery tamped down into the can around the carbon

(Deposition of Anson J. Mitchell.)

stick. There is then a paper cap placed on top of the cell, and it is taken from there to the sealing vat where the sealing wax is poured into the remaining part of the can, filling it up completely. It is then taken to a connecting department where the connections are placed on. They are then tested as to voltage and amperage, and are then allowed to stand four to six days with nothing done. They are then tested again, and if found to be what is termed first-class cells are sent to the packing department. At the same time there is sent from the jacket department a jacket cover, in which these zinc cans are placed, and this jacket discriminates the kind of cell; they are then placed into the jackets and again re-tested and if found O.K. go direct to the packer and are placed in the barrels as outlined above.

Q. Is the outside of the jacket stamped with any marks?

[57] A. The outside of the jacket is stamped; yes, sir, each and every battery that is made is made on what is termed a shop order, the shop order emanates from the factory order or shipping order. The shipping order bears a number, a serial of some kind; it may have the particulars to designate as to what kind of cells or to designate to whom it is going. This number is carried through the jacket department as well as the manufacturing department, and on each and every jacket the date of the manufacture of the cells as well as the order number, or if we call it shipping order, is shown. This is not true, of course, in the regular common ordinary goods which

(Deposition of Anson J. Mitchell.)

we ship out to the trade in and around the immediate vicinity of the factory, but on all long distance hauls, this course is always pursued.

Q. These goods were what is known as long distance goods? A. Long distance cells.

Q. Are the long distance cells of any extra or special quality?

A. They are tamped a little harder, a little more care is placed in them, so that the amperage and quality of the cell will be as good when they arrive at destination as they will if shipped to a nearby territory.

Q. Do you make any better quality of cell than these long distance cells?

A. No, we do not; that is the best cell we make.

[58] Q. Are they designated on the outside of the jacket with the quality they are? A. They are.

Q. Did you notice such marks on these cells when you examined them at New Orleans?

A. On the bottom of them, yes; each one that I tested had either the consignment number, 90, 99, 101, 114, or 102.

Q. What did these marks indicate?

A. That the goods were the actual goods shipped from our factory on the dates as specified.

Q. Did the marks indicate anything as to the quality of the goods at the time they were shipped from your factory, as to whether they were first class or not?

A. Well, not the marks, except that we knew from the marks that they were special cells made under

(Deposition of Anson J. Mitchell.)

special instructions, which cover long distance cells.

Q. Then the marks indicated that these cells were long distance cells, is that right? A. Yes.

Q. Did you examine the interior of any of these cells at New Orleans? A. No, sir; I did not.

Q. Were the jackets in good shape when you examined them at New Orleans?

A. Some were and some were scuffed.

Q. What proportion would you say were scuffed?

A. Of course, I did not test more than 25 barrels, about 25 barrels I made a test of.

Q. Did you select these barrels at random?

A. Yes, [59] any place and every place, so that they would be representative cells.

Q. You testified that they were not suitable to be sold? A. Yes.

Q. Who was there at that time, attending to the business of the ship at New Orleans?

A. There was Mr. Williams, manager of the Oregon-California Shipping Company, Mr. Kurz, of Rubelli's Sons, and a gentleman representing the Lumber Company, I met him, I didn't get acquainted with him.

Q. What was done after you made these tests?

A. I told Mr. Williams the goods were damaged, told Mr. Kurz that the goods were damaged, and that he would have to send them back to the factory in order to put them in first class shape so as to get rid of them; in other words, obtain as much salvage as possible.

Mr. PLATT.—Claimant moves to strike out the

(Deposition of Anson J. Mitchell.)

answer to the last interrogatory in so far as any claim was alleged therein as being in compliance with Section 6 of the bill of lading as to notice of damage, on the ground that that clause provides that written demand must be made within ten days after delivery, and no oral notification of claim of damage is competent within the provisions of that clause of the bill of lading, consequently the answer is incompetent, irrelevant and immaterial.

[60] Exception.

Q. Could you tell the exact extent of the damage there, without sending them back to the factory at that time?

A. It would be utterly impossible to do so, unless we took each and every barrel and unpacked it, and there would be no means of placing or putting the cells in shape for re-sale, if any were damaged, and those that I had examined were damaged.

Q. Were any of the cells crushed or out of shape, the cells themselves, oval or anything like that?

A. I think there were a few; yes, there were a few, but very few.

Q. Did many of them show bulged seals?

A. A few showed seals as running off the side, those that I examined; yes, you would call them bulged seals.

Q. From the conditions you saw, what did you conclude was the cause of the damage?

A. I concluded they had stayed in the hold of the ship where it was too hot.

Q. And what else had happened, anything?

(Deposition of Anson J. Mitchell.)

A. Practically that is all, and the delay, of course, naturally, being old cells, not strictly fresh cells.

Q. Did they show any signs of rough handling?

A. Some of the barrels were fairly well handled by the stevedores.

Q. You stated that some barrels were smashed?

A. Yes, a few.

Q. Did any of the cells have corroded caps?

A. I don't know if there were, only a few of these few that I tested.

[61] Q. What was done with that shipment after that?

A. The goods were loaded unto cars, three different cars, and on November 23d, although the goods had been loaded in the car four or five days, the railroad company released and permitted us to send them on to Jersey City.

Q. What were Mr. Kurz and Mr. Williams doing down there at that time?

A. They were arranging for the transshipment of the goods.

Q. Of your goods?

A. Yes, not only that, all the goods on this boat.

Q. Did you superintend the loading of these cars at New Orleans personally yourself?

A. I did, personally myself.

Q. Did you get the bills of lading for the goods that were issued there? A. I did.

Q. On what railroad were they shipped?

A. New Orleans & Northeastern.

(Deposition of Anson J. Mitchell.)

Q. Where were they shipped to?

A. They were shipped from the Chalmette Docks, which, as I understand, is the property of the railroad company, and shipped to our works at Jersey City.

Q. Immediately after landing?

A. No, probably a week or 10 days after landing.

Q. What was the reason for the delay?

A. I guess the **[62]** real reason was on account of financial matters between the railroad company and the steamship company.

Q. Had you asked to have that shipment sooner?

A. I had asked to have them loaded five days sooner than they were shipped.

Q. I show you a bill of lading headed New Orleans & Northeastern Railroad Company and ask you if that is the bill of lading issued to you for these goods. A. It is, it bears my signature.

Q. For all of the goods?

A. For all of the goods that were turned over.

Q. Was the freight prepaid on this shipment?

A. It was.

Q. Who paid the freight? A. I did.

Q. Are the correct amounts of freight paid stated in that bill of lading?

A. I have every reason to believe yes.

Q. Was the entire shipment shipped to Jersey City by you?

A. Yes, there was one case which we could not find at New Orleans.

Q. Was that case ever delivered to you by the

(Deposition of Anson J. Mitchell.)

steamship "Eureka"? A. Never.

Q. Was the shipment the same as originally shipped except for this shortage and the damage?

A. Yes, sir.

Q. Did those goods reach their destination at the

[63] Jersey City plant? A. They did.

The bill of lading is offered in evidence.

Mr. PLATT.—It is objected to as incompetent, irrelevant and immaterial, because paragraph 8 of the libel pleads that the cargo which is the subject of this action was delivered by the carrier to the libelant at New Orleans, La., and it is not of interest in this suit, or material what the libelant did with them in the transportation or otherwise thereafter.

Exception.

It is marked Libelant's Exhibit 31.

Q. When you took the goods from the steamship company at New Orleans, did you consent that the steamship company should be relieved from responsibility in the matter?

Mr. PLATT.—Objected to on the ground that it is asking the witness for a conclusion of law, and this inquiry is as to matters of fact and the witness cannot usurp the functions of the court to pass on these matters; the libel having pleaded a delivery of the goods by the carrier to the libelant, the legal effect of that act is a matter for the Court, and the inquiry is incompetent, irrelevant and immaterial for any purpose.

[64] A. No, sir.

Q. Did you make any explanation as to why you

(Deposition of Anson J. Mitchell.)

were shipping these goods to Jersey City?

A. I did.

Q. What? I told them that the way the goods were we could not ship them out to the customers, and that we had no facilities to put them in condition to do so, that we would ship them back to our factory and have them reconditioned and sent out, and that I would render a claim and make it as light as possible after we ascertained the damage. Mr. Williams told me at that time that he didn't care how much or what the claim was, that they had protected themselves against such claims by taking out an insurance policy covering all claims over $500 of any kind.

Mr. PLATT.—Claimant moves to strike out the answer of the witness on the ground, or for the reason, that the same is incompetent, as well as immaterial and irrelevant, because the contract between the National Carbon Company as shipper and the Oregon-California Shipping Co., Inc., as carrier, is defined by the bill of lading, Libelant's Exhibits 1, 3 and 5, and the expression of one of the officials of the Oregon-California Shipping Co., Inc., as detailed by the witness, of his lack of concern as to the size of the claim that [65] might be preferred by the libelant in the future does not rise to the dignity of a modification of the bill of lading so as to be a binding contract between the parties, or to a waiver of any of the legal rights of the owners of the vessel or their successors, in interest.

Exception.

Q. Did Mr. Williams or Mr. Kurz or any of the

(Deposition of Anson J. Mitchell.)

other agents of the vessel present see this cargo with you while you were there? A. Yes.

Q. Did they know its condition?

Mr. PLATT.—Objected to unless you define who he is talking about.

A. Yes, both Mr. Williams and Mr. Kurz.

Q. I was going to say, which of the agents were present?

A. Both, and the captain, of course, of the boat.

Q. Did you state to them that you were going to make a claim for the damage?

Mr. PLATT.—Objected to on the ground that the bill of lading defines under Clause 6 "the claim must be in writing" and an oral assertion of the intention to present a claim cannot be considered under the contract between the parties as being a claim, hence it is incompetent, irrelevant and immaterial.

[66] Exception.

A. I did.

Q. Did they ask you to make any claim in writing at that time?

Mr. PLATT.—Objected to as immaterial whether they asked that such a claim be made. The contract itself provides for the action to be taken by the shipper and the answer sought to be elicited is incompetent, irrelevant and immaterial.

Exception.

A. No.

Q. Did they ask you as to how much the shipment was damaged, your estimate of it?

A. Yes—they didn't ask me it that way, but we

(Deposition of Anson J. Mitchell.)

were talking, and they did ask as to about what extent the things were damaged, to which I replied it would be impossible for me to tell until after the tests were made at our factory.

Q. Did you call their attention to the fact that you had mentioned the damage in telegrams before this?

A. You mean at New Orleans.

Q. Did you refer to your previous telegrams in respect to the damage?

A. I can't say that it was referred to in that way, the whole matter was talked of and discussed several times by both Mr. Williams, Mr. Kurz and myself.

Mr. PLATT.—Claimant renews its objection to both of the last three interrogatories and [67] moves that the answers be stricken out for the same reasons as last outlined concerning inquiries of the same character.

Exception.

A. It was thoroughly understood by Mr. Williams and Mr. Kurz that there would be a claim for damages.

Same motion. Same exception.

Q. Did they say anything as to what would be done about paying the claim if you put one forward?

Same objection. Same exception.

A. Yes.

Q. What did they say?

Same objection. Same exception.

A. Mr. Williams stated that he himself was financially ruined, that this Oregon-California Shipping Company or this contract they had entered into

(Deposition of Anson J. Mitchell.)

would financially ruin him.

Q. Which contract?

A. With the Crossett Western Lumber Company.

Q. The charterers of the vessel?

A. Yes, it would ruin him, but that I would be protected and my claim would be protected by this bond or insurance which he had taken out covering all claims of any kind over $500.

Mr. PLATT.—Claimant moves to strike out the answer for the same reasons as heretofore detailed as to the same.

Exception.

[68] Q. I show you a copy of a letter dated December 1, 1915, addressed to Phelps Brothers & Company, New York City, and L. Rubelli's Sons of Philadelphia, and ask you if that is a correct copy of a letter sent to those two firms on that date?

A. It is.

Q. That letter was sent by you as traffic manager of the National Carbon Company? A. Yes, sir.

The letter is offered in evidence.

Mr. PLATT.—Objected to on the ground that if it is intended that the document tendered should be considered as a claim under Clause 6 of the bill of lading requiring that a written demand for the damage should be made upon the carrier within ten days after actual delivery of the goods, the same is too late, because it appears from Libelant's Exhibit 31 that the bill of lading was issued to the libelant for these goods on November 20, and it must have received the goods from the carrier prior to Novem-

(Deposition of Anson J. Mitchell.)

ber 20th. Objected to on the further ground that the document tendered in evidence does not comply with the requirements of Section 6 of the conditions of the bill of lading, in that it is not a claim, but a mere notice of an intention to present a claim, and for both and all of these reasons it is incompetent, irrelevant and immaterial [69] and on the further ground that it is not presented to the carrier, but is addressed to the shipping agents who had to do with the solicitation of the freight, as detailed in evidence by the witness, and does not, for that reason, comply with Section 6 of the conditions of the bill of lading, and is incompetent, irrelevant and immaterial.

Exception.

It is marked Libelant's Exhibit 32.

Q. Did the steamship "Eureka" or her agents or owners or charterers make any request for any more specific claim from you than contained in this letter last offered in evidence?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, because the bill of lading, Libelant's Exhibits 1, 3 and 5, define the character of the claim which must be presented for damage to cargo as contended for and as against the owner of the vessel or the vessel or the successor in interest to the owner of the vessel, and it is not within the power of the Oregon-California Shipping Company to waive the provisions of the bill of lading, neither is the inquiry sufficiently explicit to produce a legal waiver, if answered in the affirmative, therefore

(Deposition of Anson J. Mitchell.)

[70] it is incompetent, irrelevant and immaterial.

Exception.

A. No.

Q. When were the goods delivered to you at New Orleans, Mr. Mitchell?

A. November 23d; the bill of lading was issued by the railroad November 20, when the goods were loaded, but was not delivered to me until the 23d.

Mr. PLATT.—I move to strike out the answer on the ground that the libelant is bound by its Exhibit 31, introduced in evidence, which shows legal title in the libelant to these goods, and the affirmation of itself in tendering this exhibit as evidence, and the action of the railroad company in issuing the bill of lading therefore it is incompetent to attempt to deny the authenticity of its own exhibit heretofore presented in evidence, therefore the inquiry becomes immaterial, and the testimony should be stricken out for those reasons.

Exception.

Q. When was this bill of lading delivered to you or to your company?

A. Either November 24th or 25th, I forgot which it was, it was delivered to me by Mr. Tate, who is the general agent for this road, and he stated that until financial arrangements were completed between the agents [71] of the steamship "Eureka" and the Crossett Western Lumber Company's attorney and his railroad that they would not deliver any bills of lading or any of the cargo to any one or even allow it to leave Chalmette Docks or yards.

(Deposition of Anson J. Mitchell.)

There had been a controversy regarding the advancement of freight charges accruing on a great number of shipments contained in the boat, covering the shipments from Philadelphia and New York, in other words, a great number of people had allowed their goods to come forward freight charges collect, instead of prepaid, and the question arose with the railroad companies as to the legal right of their advancing to either the steamship company, their agents, or any one, moneys covering the freight charges from New York or Philadelphia to the port of delivery, which in this instance was New Orleans. The Southern Pacific, to whom the boat's cargo was originally intended to go, refused to advance any moneys on this cargo, which necessitated the boat leaving the Southern Pacific docks and going over to the Chalmette Docks, which in this instance is a belt line controlled by the New Orleans & Northeastern Railroad Company, from which deliveries to all the railroads in the city can be made. The arrangements for collecting of these charges were afterwards adjusted, as I understand it, between one of the representatives of the Santa Fe System and also one of the 'Frisco systems, and for that reason no goods [72] were permitted to be turned over to anyone demanding them or to any of the railroads until that legal question was cleared up.

Mr. PLATT.—I move to strike out the answer of the witness on the same grounds, offered as objections to the last preceding interrogatory, on the motion to strike out the answer thereto.

(Deposition of Anson J. Mitchell.)

Exception.

Q. Had any of these goods left the control of the S. S. "Eureka" before November 23d?

Same objection and motion. Same exception.

A. No, sir.

Q. Did Rubelli's Sons or Phelps Brothers & Company or the S. S. "Eureka" make any reply to your letter of December 1, Mr. Mitchell?

A. They did.

Q. I show you a letter from Rubelli's Sons dated the 3d of December, 1915, and ask you if that is the reply? A. That is the real reply.

The letter is offered in evidence. It is marked Libelant's Exhibit 33.

Q. Mr. Williams called on you at the hotel in New Orleans, did he not? A. He did.

Q. What hotel were you stopping at?

A. De Soto.

Q. I show you a card with the name of Mr. Williams on it, and ask you if that is the card left at the hotel [73] De Soto by him, for you?

A. This card I found in my box when I came back from some part of the city,—I don't know just where it was, and immediately after getting same—not immediately, the following morning after getting same I went over to the St. Charles Hotel and had an interview with Mr. Williams and Mr. Kurz, and Mr. Williams then told me that he had left the card there for me, which is this one.

Q. Is that the stamp of the Hotel De Soto on the back of that card? A. It is.

(Deposition of Anson J. Mitchell.)

Q. Does that stamp show the time it was left at the hotel? A. It does.

The card is offered in evidence. It is marked Libelant's Exhibit 34.

Q. I show you a letter from Phelps Brothers & Company dated December 9th, and ask you if that is the letter received by you from them on or about that date? A. It is.

The letter is offered in evidence. It is marked Libelant's Exhibit 35.

Mr. PLATT.—Objected to for the same reasons as those heretofore urged to Libelant's Exhibit 32.

Q. When did these batteries arrive at your Jersey City plant?

A. As reported to me by the receiving clerk, received on December 6, 1915.

[74] Q. I show you a copy of a letter dated December 6th, to Rubelli's Sons and Phelps Brothers & Company, and ask you if that is a correct copy of a letter sent by you to them on that date?

A. It is.

Q. The duplicate original sent by you to them on that date? A. Yes, sir.

The letter is offered in evidence.

Mr. PLATT.—It is objected to on the following grounds: first, the same grounds as those heretofore interposed on the offering of Libelant's Exhibit 32, and upon the additional ground that more than 10 days had elapsed since the delivery of the cargo to the libelant, and it was too late, under Clause 6 of the conditions of the bill of lading to present a claim,

(Deposition of Anson J. Mitchell.)

and upon the further ground that as shown by Libelant's Exhibit 33, L. Rubelli's Sons and Phelps Brothers & Company had, under date of December 3, 1915, notified the libelant that they were not the agents of the Oregon-California Shipping Company, to whom a claim should be presented, but were merely the agents for solicitation and providing for cargo, and therefore the instrument now offered in evidence is incompetent, irrelevant and immaterial as not presented to the carrier under said Section 6 of the bill of [75] lading.

Exception.

It is marked Libelant's Exhibit 36.

Q. I show you a letter dated December 8, 1915, to you from Rubelli's Sons, and ask you if that is a letter received by you on or about that date?

A. It is.

The letter is offered in evidence.

No objection.

It is marked Libelant's Exhibit 37.

Q. Did you receive any reply to your letters with reference to the damage, sent subsequent to your arrival in New Orleans, other than the letters already offered in evidence?

A. I think I did, I think I have a letter from the Oregon-California Shipping Company, I think I have got a letter from Mr. Williams' office acknowledging receipt of the claim.

Q. I show you a letter dated January 11, addressed to L. Rubelli's Sons, Phelps Brothers & Company, and the Oregon-California Shipping Company, and

(Deposition of Anson J. Mitchell.)

the Mannheim Insurance Company, New York City, and ask you if that is the duplicate original of the letter sent to those firms on that date? A. It is.

The letter is offered in evidence.

Mr. PLATT.—It is objected to on the same grounds as Libelant's Exhibit 32.

[76] Exception.

It is marked Libelant's Exhibit 38.

Q. I show you a letter headed L. Rubelli's Sons, dated January 13th, 1916, and ask you if that is a letter that was received by you?

A. Yes, on January 14th.

The letter is offered in evidence. It is marked Libelant's Exhibit 39.

Q. I show you a letter dated January 13, 1916, under the heading Phelps Brothers & Company, and ask you if that is the original letter received by you?

A. It is.

The letter is offered in evidence.

Mr. PLATT.—Objected to on the same grounds as urged to Libelant's Exhibits 32 and 38.

Exception.

It is marked Libelant's Exhibit 40.

Q. I show you a letter dated Portland, Oregon, February 12, 1916, addressed to the National Carbon Company, and ask you if that is the original letter received by you?

A. Yes, received by us on February 17th.

The letter is offered in evidence.

Mr. PLATT.—Objected to for the same reasons as those heretofore offered as to Libelant's Exhibit

(Deposition of Anson J. Mitchell.)

32, and on the further ground that the carrier is not bound by any alleged admissions or [77] statements that are in conflict with the provisions of Section 6 of the conditions of the bill of lading providing for the time, form and manner of presenting claims of damages, all of which provisions at all times the claimant and the ship claim the full benefit of without the right of waiver on the part of anybody whomsoever, and for all these reasons the document is incompetent, irrelevant and immaterial.

Exception.

It is marked Libelant's Exhibit 41.

Q. What was done with these goods after they got to your factory at Jersey City?

A. We inspected each and every battery, unpacked them and inspected them and put them out in new jackets, and retouched the cells and sent them out, or as many as we could possibly use.

Q. That is a branch of the National Carbon Company?

A. Yes, under the Cleveland management, and follows the same plan as at Cleveland.

Q. The same methods and marks are followed at all your factories, aren't they? A. Everything.

Q. When these goods were shipped out the second time did they go out as new goods or a lower grade?

A. The majority of them went out as a lower grade.

Q. Was there any difference in the market for batteries at that time, than at the date when they were [78] originally consigned?

Mr. PLATT.—Just let me make one objection here,

(Deposition of Anson J. Mitchell.)

which will be a continuing one. The claimant objects to all interrogatories and answers thereto which relate to matters of damage subsequent to the delivery of the goods by the carrier to the libelant at New Orleans on the ground that they are immaterial, and any proof concerning them is incompetent and irrelevant because no claim was presented to the carrier in accordance with provision 6 of the conditions of the bill of lading, within 10 days after the delivery, and it may be considered that the objection is continued on all inquiries of that nature. I object further to the question and to all questions of a similar character on the ground that they are incompetent, irrelevant and immaterial, because the witness has already testified that the depreciation in the cells was due to heat and the length of time they were in the hold of the vessel, and both of said causes testified to by the witness as the cause of the depreciation are within the exceptions of paragraphs 1, 3 and 8 of the conditions of the bill of lading, and not the foundation of a claim between the parties, or a claim of damage against [79] the vessel.

Exception.

A. There was a two cent difference; at the time of shipping them out, had we been able to sell them at that time we would have gotten two cents a cell more than what we got when we really sold them.

Q. When you finally shipped them?

A. When we finally shipped them.

Q. There had been a two cent drop in the market from the time the batteries would have originally

(Deposition of Anson J. Mitchell.)

reached their destination to the time when they were actually resold? A. Exactly.

Q. Assuming, Mr. Mitchell, that a shipment of batteries such as these were placed on board a vessel on the dates testified to, and went forward through the Panama Canal at this time of year, in the ordinary course of matters would they show any depreciation at their California destination?

A. Practically none.

Q. If a shipment of these batteries left New York on or at the time of year testified to and arrived at Colon or in the Canal Zone in the ordinary running time, say of about 12 days, and were delayed there for a period of a few days, and then were returned to New Orleans in the same vessel, would they ordinarily show any signs of depreciation?

Mr. PLATT.—Objected to on the grounds [80] previously stated, and on the further ground that the witness has not shown that he has had any experience in so shipping via the route which is assumed as the basis for the inquiry, therefore he is incompetent to express an opinion on a state of facts concerning which he has not shown any experience.

Exception.

A. No.

Q. Did you have any experience with other shipments of batteries on other vessels from New York to Panama Canal which had been turned back at about this time?

A. Yes, there were two carloads of dry batteries delivered to a steamship company and this steamship

(Deposition of Anson J. Mitchell.)

proceeded to the canal, to Colon, and was unable to get through on account of the slide. After laying there for two or three days the steamer returned and brought the batteries back and delivered them to us at Jersey City.

Q. Where did the steamer land at, at what port?

A. New York or Brooklyn, I don't know which.

Q. Returned to New York?

A. Yes, returned to New York.

Mr. PLATT.—I move to strike out the testimony of the witness in response to the last inquiry on the ground that it is incompetent, irrelevant and immaterial because, as shown by the evidence elicited [81] so far by the witness in this case, the carrier in the handling of the goods shipped by the libelant at all times did it in accordance with the provisions of the bill of lading between the parties, and no claim for damages can be predicated upon what happened to some other shipments which may or may not have been handled in a different way under a different bill of lading, or a similar bill of lading, unless it be shown that the carrier in this case did convey the cargo belonging to the libelant contrary to the provisions of the bill of lading, and for all these reasons the testimony should be stricken out.

Q. Does heat and the ventilation of the place in which dry batteries are stored affect them?

A. It does.

Q. What effect does it have?

A. It tends to shorten the life of a dry battery; it also tends to melt the wax and naturally creates

(Deposition of Anson J. Mitchell.)

a quicker deterioration of the life of a cell.

Q. Does it affect the seals?

A. It does, is melts the wax, which is the seal, and as soon—for instance, if the wax is melted it will permit air to strike into the interior of the battery, and the interior of the battery must contain moisture, or it will not work. In other words, just as soon as the moisture of a battery is absorbed then [82] the battery is dead. You can take a dead battery to-day, break open the seal and pour in water or a solution of sal-ammoniac, and restore a certain percentage of the life of that battery, but it will, of course, only be a short life, it is only a temporary relief.

Q. And if the seals are melted or softened in that way, does that cause the batteries to leak, would they show any signs of leakage?

A. Yes, that would permit it, that makes them unmarketable.

Q. Why?

A. Because the customer realizes that something abnormal has been given to these batteries.

Q. Did any of the batteries examined by you at New Orleans show signs of leakage?

A. They showed signs of the pitch being melted, but they had showed signs—I cannot tell distinctly without internal examination and I was not in condition to do that.

Q. Any stains on the jackets?

A. Some of them had a little scuff; I don't know, I don't remember.

(Deposition of Anson J. Mitchell.)

Q. Have you had any actual experience on vessels, Mr. Mitchell? A. Myself?

Q. Yes? A. Oh, yes.

Q. What was it?

A. I was agent for the Union Transit Line and the Crescent Transit Line vessels operating on the Great Lakes, and as such it was necessary for me to check freight in and out of boats, at various times I was in the holds, and had charge of the stevedores.

[83] Q. Were you in the holds both when the vessel was standing still and when it was in motion?

A. Yes.

Q. Is there any difference in the amount of heat in the holds of a vessel if it is standing still or if it is in motion?

A. Yes, especially where there is a ventilator, and all the boats I have ever been in had ventilators of this kind.

Q. What is the difference between when a vessel is standing still and when it is in motion, as to heat?

A. The ventilators are nothing more or less than a big pipe, funnel shaped at the outside, which catch all the air, or as much air as is going, or as much air as they want, or as the watchman believes should be forced into the hold to avoid internal combustion or fires.

Q. Is it necessary for the vessel to be in motion for those ventilators to work?

A. Well, naturally there would be very little draft when the boat was standing still, and a great lot of draft when the boat is going.

(Deposition of Anson J. Mitchell.)

Q. Would the heat in the holds of a vessel be more when she was standing still than when she was going?

A. Very much so.

Q. Would this condition pertain to the "Eureka" if she was lying at Colon, would it be hotter in her holds standing still than if she was in motion?

A. I would have every reason to believe so.

[84] Mr. PLATT.—I move to strike that out unless it be shown that the witness was at Colon at this time of year, and knew the approximate temperatures at that time, and also on the ground that the witness has not shown whether or not the "Eureka" is a ventilated vessel, therefore an expression of opinion of this subject without this prerequisite knowledge is wholly immaterial and incompetent.

Exception.

Mr. WELLES.—Libelant reserves the privilege of connecting up any testimony by statements of other witnesses.

Q. How long were you on vessels this way, as shipping agent?

A. Approximately I think it was four or five years, either four or five years,—I was connected not as agent, as check clerk and then bill clerk.

Q. What were your occupations during this period?

A. First check clerk, then bill clerk, then clerk, then agent, and then traveling agent, then I quit.

Q. Did you have occasion to go on the ocean as well as on the Great Lakes during this time?

A. Yes, I have been on the ocean several times,

(Deposition of Anson J. Mitchell.)

and I have been all over the lakes, six or seven different times.

Q. And in the holds of vessels?

A. And in the holds of vessels.

Mr. PLATT.—I move to strike out all the [85] testimony of the witness with regard to what his experience on the Great Lakes has been, as not qualifying him to express an opinion as to the conditions in tropical waters, or going to and from the Panama Canal, as not making him competent as an expert to express opinions as to the conditions of weather, loading, heat, cargo or otherwise, which objection is considered as made to all of the inquiries above made.

Q. Was your experience on the Great Lakes and on the ocean similar—with vessels similar to the "Eureka"?

A. Well, on the Great Lakes it was practically the same kind of steamers, but on the ocean, of course, it was passenger steamers I was on.

Q. What sort of a vessel is the "Eureka"?

A. I don't know what you would call her.

Q. Freighter or what? A. Freighter, yes.

Q. What is known as a tramp steamer?

A. Considered a tramp steamer.

Q. I mean what is known as the tramp type of steamer? A. Yes, sir.

Adjourned to December 15, 1916, at 10 A. M.

(Deposition of Anson J. Mitchell.)

[86] New York, December 15, 1916, 10 A. M.

Met pursuant to adjournment.

Present as before.

Examination of ANSON J. MITCHELL (Continued).

(By Mr. WELLES.)

Q. Mr. Mitchell, what was the total value of the shipment which left Cleveland August 31, 1915, consisting of 116 barrels?

A. The total value was $3,390.69.

Q. Was that the value at the time that they were placed on board the "Eureka" at New York?

A. It was.

Q. What was the value of the shipment which left Cleveland under date of September 4, 1915?

A. One of the cars was $3,642.75.

Q. What did that shipment consist of?

A. Goods loaded in New York Central car #204,849 on September 4th, consisting of 124 barrels and one box, valued at $3,642.75 when loaded on the steamer at Philadelphia.

Q. As to the third shipment?

A. A shipment which left Cleveland on September 4th on C. R. R. of N. J. car #30,796, consisting of 123 barrels and 12 boxes of cells, and was [87] valued at $3,619.70 when loaded on the steamer at Philadelphia.

Q. What was the total value of all three shipments at the time they were loaded on board the "Eureka"?

A. $10,653.14.

(Deposition of Anson J. Mitchell.)

Q. What price did you receive for these goods when resold?

Mr. PLATT.—Objected to on the ground that the same is incompetent, irrelevant and immaterial, because under the testimony as heretofore introduced in evidence by this witness, the deterioration in the value of the subject of the shipment by the libelant upon the steamship "Eureka" was due to causes specifically excepted in the bill of lading under which the goods were shipped, to wit: deterioration arising from heat and confinement in the hold of the vessel, both in and of themselves, and as connected with the prolongation of the voyage, which was likewise within the exceptions of the terms of the bill of lading, and due likewise to the deterioration in value or deterioration in quality, or both, due to the inherent character of the commodity under carriage, from any liability for which the carrier was expressly excepted by Clauses 1, 2, 3 and 8 of the bill of lading, Libelant's Exhibits 1, 3 and 5, the benefit of [88] each and all of which provisions is expressly claimed by the vessel and the claimant, as well as all other provisions of the bill of lading, whether specifically enumerated or not, and for each and all of these reasons the question and the answer thereto are each incompetent, irrelevant and immaterial; which objection the claimant at this time makes to each and all of the inquiries relating to damage to the cargo, deterioration in quality, depreciation in value, or any other shrinkage or loss in market value of every kind and nature, without renewing

(Deposition of Anson J. Mitchell.)

this objection to each and every succeeding inquiry of the same character, and in addition thereto, the carrier and the claimant places the same objection in the record as a motion to strike out as incompetent, irrelevant and immaterial each and every answer relating to proof of damage on the same grounds and for the same reasons, where the form of the question does not indicate in advance that the question of damage is the question under consideration, and makes this motion as a continuing motion to each and all answers relating to the question of damage, without the necessity of renewing the said motion to each and all answers wherein the subject matter of the [89] answer is in whole or in part the question of damage, depreciation, deterioration, shrinkage or loss of market or other value.

Mr. WELLES.—Excepted to as incompetent, irrelevant and immaterial, and consisting of conclusions of law and conclusions of fact not warranted by the evidence.

A. A total net price of $7,831.01.

Q. What was the difference in price—the difference in the value and the resale price?

Same objection and motion. Same exception.

A. $2,822.13.

Q. What was this difference due to?

Same objection and motion. Same exception.

A. To the damage accruing on account of the goods being delayed and not having been turned over to us at Colon upon our first demand.

Mr. PLATT.—Claimant moves to strike out the

(Deposition of Anson J. Mitchell.)

foregoing answer, in addition to the continuing motion, on the additional ground that the same is incompetent, irrelevant and immaterial for the reason that there was no obligation resting upon the carrier, under the terms of the bill of lading, to deliver part cargo to an individual consignor, such as the libelant, at Colon or at any other point [90] selected by the consignor, and that, as disclosed by the evidence, the delivery of the shipment at New Orleans was accepted by the libelant without any objection as to time or place, and whether or not it was so accepted, it was, under the terms of the bill of lading, a legal delivery in accordance with the terms and conditions of the bill of lading, Libelant's Exhibits 1, 3 and 5.

Same exception.

Q. What freight charges did you pay from New Orleans to Jersey City on these three shipments?

Same continuing motion and objection.

Same exception.

A. $401.43.

Q. What expenses did you pay at New Orleans?

Same continuing objection and motion.

Same exception.

A. $261.81.

Q. What did those charges consist of, briefly, at New Orleans?

A. My expenses down there and while at the hotel, and also the charges, the money that we gave the men there for assisting in unpacking and repacking and recoopering the barrels, and incidental expenses.

(Deposition of Anson J. Mitchell.)

Mr. PLATT.—I move to strike out the testimony with reference to the question of expenses [91] of the witness as not specifying any amount, and on the ground that the same would not be recoverable as an element of damage in a case of this character, and is incompetent, irrelevant and immaterial for this reason.

Same exception.

Q. What did you pay for labor and material to put the cells in shape for shipment to Jersey City?

Same continuing objection and motion.

Same exception.

A. $414.40.

Q. Did you pay anything for incidental expenses prior to turning the goods over?

Same objection, motion and exception.

A. $137.81.

Q. Please state in detail what these incidental expenses consisted of?

A. Telephone calls for account of the S. S. "Eureka" as follows:

10/14/15 to Philadelphia	.....	$6.35
10/16/15 " "	.....	9.95
10/19/15 " "	.....	4.55
11/1/15 " "	.....	2.75
11/8/15 " "	.....	2.75
11/11/15 " "	.....	2.75
Amounting to	.....	29.10

(Deposition of Anson J. Mitchell.)

Telegrams for account of S. S. "Eureka", as follows:

10/1/15 Rubelli Sons, Phila.....	.40	
10/25/15 Oregon-Cal. Shipping Co., Portland, Ore.	3.19	
[92]		
10/27/15 Oregon-Cal. Shipping Co., Portland, Ore.	1.69	
11/3/15 Rubelli Sons, Phila.....	.60	
11/3/15 Oregon-Cal. Shipping Co.....	1.21	
11/4/15 " " "	1.50	
11/5/15 " " "	1.69	
11/11/15 Kurz, Chicago.....	.35	
11/11/15 Dwyer "	.53	
Amounting to		11.16

Trips to Philadelphia:

10/9/15 Trip to Philadelphia.....	54.25	
10/22/15 " " "	43.30	
Amounting to	$97.55	
And making a total in all of.....		$137.81

Mr. PLATT.—In addition to the foregoing motion, the claimant moves to strike out the said testimony as incompetent, irrelevant and immaterial on the ground that the character of the expenditures therein set forth are not such as are a proper element of damage in connection with the alleged depreciation and deterioration in the subject matter of the shipment.

Exception.

(Deposition of Anson J. Mitchell.)

Q. What was the total of the charges above stated by you?

Same objection, motion and exception.

A. $1,215.45.

Q. What does this amount to, if added to the difference between the price at which the goods were resold and the original value at the point of shipment?

[93] Same objection, motion and exception.

A. $4,037.58.

Q. Does that include the total of your damages?

Same objection, motion and exception.

A. No, it does not include a drop or change in price of two cents per cell which we would have received had the goods been delivered on schedule time at destination; neither does it include insurance charges, nor additional freight covering the barrels of batteries which we were compelled to ship to the same destination on account of these not being delivered as originally consigned.

Mr. PLATT.—In addition to the continuing motion to strike out, claimant moves to strike out all of that portion of the witness' testimony as incompetent, irrelevant and immaterial, which relates to the prospective profits which the libelant might have made, provided the goods had been carried through the Panama Canal to the points of original delivery named in the bill of lading, on the ground that the prospective profits are not proper elements of damage, and I move to strike out that portion of the answer of the witness which relates to additional

(Deposition of Anson J. Mitchell.)

freight charges or transportation charges on substituted material subsequently claimed to have been forwarded to the same points **[94]** of destination as the shipments covered by Libelant's Exhibits 1, 3 and 5, on the ground that the same are not proper elements of damage.

Exception.

Q. Will you please state in detail the cells from this shipment that were shipped from your Jersey City plant and resold and the prices that were realized for them, and the dates on which they were shipped?

Same objection, motion and exception.

They are as follows:

1916.					Amt. of Invoice.
Jan. 11—	BJ-31323—	125	2¼x6	IGNITORS-SCREW	23.57
	BJ-31342—	125	2¼x6	" "	24.38
	BJ-31347—	125	2¼x6	" "	28.75
	BJ-31356—	125	2¼x6	" "	28.75
	BJ-31359—	125	2¼x6	" "	24.38
	BJ-31368—	125	2-x6	REGULARS-SCREW	23.75
	BJ-31369—	125	2¼x6	IGNITORS-SCREW	24.38
	BJ-31376—	125	2¼x6	" "	28.75
	BJ-38087—	125	2¼x6	" "	28.75
Jan. 12—	BJ-31330—	125	2¼x6	GLOBE-SCREW	21.88
	BJ-31334—	125	2¼x6	REGULARS-SCREW	27.85
	BJ-31349—	125	2¼x6	IGNITORS-SCREW	23.16
	BJ-31361—	125	2¼x6	" "	24.38
	BJ-31363—	125	2¼x6	" "	28.75
	BJ-31380—	125	2¼x6	" "	28.75
	BJ-31390—	125	2¼x6	" "	23.16
	BJ-31400—	125	2¼x6	" "	23.16
	BJ-31406—	250	2¼x6	REGULARS-SCREW	47.50
	BJ-31424—	125	2¼x6	IGNITORS-SCREW	28.75
	BJ-31432—	125	2¼x6	" "	24.38
	BJ-31441—	125	2¼x6	" "	24.38
	BJ-37701—	125	2¼x6	" "	23.16
	BJ-37702—	125	2¼x6	" "	23.16
	BJ-38078—	125	2¼x6	" "	28.75

[95] 1916.					Amt. of Invoice.
Jan. 13—	BJ-31394— 125	2½x6	IGNITORS-SCREW	.....	28.75
	BJ-31412— 125	2½x6	" "	.....	28.75
	BJ-31415— 125	2½x6	" "	.....	24.38
	BJ-31422— 125	2½x6	" "	.....	23.16
	BJ-31426— 125	2½x6	" "	.....	23.16
	BJ-31433— 125	2½x6	" "	.....	24.38
	BJ-31443— 125	2½x6	" "	.....	28.75
	BJ-31445— 125	2½x6	" "	.....	28.75
	BJ-31449— 125	2½x6	" "	.....	24.38
	BJ-31464— 125	2½x6	" "	.....	24.38
	BJ-31475— 125	2½x6	" "	.....	28.75
	BJ-31478— 125	2½x6	" "	.....	24.38
	BJ-31489— 125	2½x6	" "	.....	23.16
	BJ-31499— 125	2½x6	" "	.....	24.17
	BJ-31500— 125	2½x6	" "	.....	23.78
	BJ-37521— 125	2½x6	" "	.....	23.16
	BJ-37522— 125	2½x6	" "	.....	23.16
	BJ-37704— 500	2½x6	REGULARS-SCREW	.....	90.25
	BJ-38077— 125	2½x6	ATLANTICS-SCREW	.....	23.13
	BJ-38105— 125	2½x6	IGNITORS-SCREW	.....	23.16
	BJ-38109— 125	2½x6	" "	.....	28.75
	BJ-38118— 125	2½x6	" "	.....	24.38
	BJ-38131— 125	2½x6	" "	.....	28.75
Jan. 14—	BJ-31467— 125	2½x6	IGNITORS-SCREW	.....	24.38
	BJ-31476— 125	2½x6	" "	.....	28.75
	BJ-31477— 125	2½x6	" "	.....	24.38
	BJ-31507— 125	2½x6	" "	.....	23.16
	BJ-31509— 125	2½x6	" "	.....	24.38
	BJ-31515— 125	2½x6	" "	.....	23.16
	BJ-31521— 125	2½x6	REGULARS-SCREW	.....	22.56
	BJ-31522— 125	2½x6	" "	.....	22.56
	BJ-31523— 750	2½x6	" "	.....	135.38
	BJ-31524— 125	2½x6	" "	.....	22.56
	BJ-31525— 125	2½x6	" "	.....	22.56
	BJ-31536— 125	2½x6	IGNITORS-SCREW	.....	24.38
	BJ-31541—1250	2½x6	" "	.....	287.50
	BJ-37711— 625	2½x6	REGULARS-SCREW	.....	118.75
	BJ-38112— 125	2½x6	IGNITORS-SCREW	.....	28.75
	BJ-38113— 125	2½x6	" "	.....	28.75

[96]

1916.					Amt. of Invoice.
Jan. 15—	BJ-31528—	125	2½x6	IGNITORS–SCREW	23.16
	BJ-31529—	125	2½x6	" "	23.16
	BJ-31535—	125	2½x6	" "	24.38
	BJ-31538—	125	2½x6	" "	24.38
	BJ-31539—	125	2½x6	" "	23.81
	BJ-31566—	125	2½x6	" "	24.38
	BJ-31571—	125	2½x6	" "	24.38
	BJ-31585—	2500	2½x6	" "	487.50
	BJ-31608—	125	2½x6	" "	23.16
	BJ-37703—	125	2½x6	" "	23.16
	BJ-37726—	125	2½x6	" "	23.16
Jan. 17—	BJ-31462—	125	2½x6	REGULARS–SCREW	23.75
	BJ-31514—	125	2½x6	ATLANTIC–SCREW	20.63
	BJ-31626—	125	2½x6	IGNITORS–SCREW	24.38
	BJ-31639—	125	2½x6	" "	24.38
	BJ-38074—	125	2½x6	" "	25.54
Jan. 18—	BJ-31657—	125	2½x6	IGNITORS–SCREW	24.38
	BJ-31670—	500	2½x6	REGULARS–SCREW	99.75
Jan. 19—	BJ-38208—	125	2½x6	IGNITORS–SCREW	31.88
Jan. 20—	BJ-31760—	125	2½x6	REGULARS–SCREW	26.25
	BJ-31764—	125	2½x6	" FAHN.	26.25
	BJ-31772—	125	2½x6	" "	23.57
	BJ-31788—	125	2½x6	" SCREW	24.94
	BJ-31805—	125	2½x6	" "	24.94
	BJ-37722—	125	2½x6	" "	22.56
	BJ-38194—	125	2½x6	CONNECTICUT–SCREW	27.01
	BJ-38249—	125	2½x6	REGULARS–SCREW	27.50
Jan. 21—	BJ-31828—	125	2½x6	REGULARS–SCREW	30.00
	BJ-31855—	1250	2½x6	" FAHN.	300.00
	BJ-38227—	375	2½x6	" SCREW	82.50
Jan. 25—	BJ-31926—	125	2½x6	REGULARS–SQ. C. SCREW...	26.25
	BJ-31978—	125	2½x6	" SCREW	26.25
	BJ-32001—	125	2½x6	" "	30.00
Jan. 27—	BJ-31972—	8	0–4	COLUMBIA CELLS	1.36
	BJ-32011—	125	2½x6	REGULARS–SCREW	24.94
	BJ-32061—	250	2½x6	" "	52.50
	BJ-32089—	250	2½x6	" "	52.50
	BJ-32094—	125	2½x6	" FAHN.	24.94

[97] 1916.					Amt. of Invoice.
Jan. 28—	BJ-31964—	250	2½x6	ATLANTICS-SCREW	46.25
	BJ-32077—	125	2½x6	REGULARS-SCREW	26.25
	BJ-32085—	125	2½x6	" "	30.00
	BJ-32111—	125	2½x6	IGNITORS-SCREW	25.54
	BJ-32114—	125	2½x6	REGULARS-SCREW	27.50
	BJ-32116—	125	2½x6	" "	22.56
	BJ-38378—	125	2½x6	" FAHN.	24.94
	BJ-38400—	125	2½x6	" SCREW.	30.00
Jan. 29—	BJ-32080—	125		EASTERN-SCREW	30.00
	BJ-32106—	125		REGULARS-SCREW	26.25
	BJ-32217—	125		" "	24.94
	BJ-32221—	125		IGNITORS-SCREW	26.88
	BJ-38330—	125		REGULARS-SCREW	24.94
	BJ-38401—	125		" "	30.00
	BJ-32090—	625		ROYAL BLUE CELLS.....	118.75
Jan. 31—	BJ-32048—	125		IGNITORS-SCREW	26.88
	BJ-32124—	125		REGULARS-SCREW	30.00
	BJ-32134—	125		RED LABEL REGS. SCREW..	24.94
	BJ-32189—	125		IGNITORS-SCREW	24.88
	BJ-32248—	125		REGULARS-SCREW	29.93
	BJ-32254—	125		IGNITORS-SCREW	26.88
	BJ-32266—	125		" "	26.88
	BJ-38391—	125		ATLANTICS-SCREW	23.13
	BJ-38460—	625		REGULARS-SCREW	131.25
	BJ-38461—	125		IGNITORS-SCREW	26.88
	BJ-32279—	125		REGULARS-SCREW	26.25
Feb. 1—	BJ-32249—	125		REGULARS-SCREW	24.94
	BJ-38441—	125		GLOBE CELLS-SCREW	25.63
Feb. 2—	BJ-32206—	800		REGULARS-SCREW	168.00
	BJ-32282—	375		ATLANTICS-SCREW	69.38
	BJ-32290—1000			REGULARS "	210.00
	BJ-32303—1000			EXETER CELLS SCREW.....	185.00
	BJ-32350—	125		REGULARS-SCREW	26.25
	BJ-32361—	125		" "	25.54
	BJ-38485—	125		" "	30.00
	BJ-38538—	125		" "	27.50
Feb. 3—	BJ-38575—	125		REGULARS-SCREW	30.00
Feb. 4—	BJ-32401—	125		REGULARS-SCREW	26.25
Feb. 5—	BJ-32439—	250		REGULARS-SCREW	49.87
	BJ-38622—	125		" "	26.25

[98] 1916.					Amt. of Invoice.
Feb.	7—BJ-32268— 250			REGULARS-SCREW	60.00
	BJ-32523— 125			" "	26.25
Feb.	8—BJ-32408— 125			EASTERN CELLS-SCREW...	30.00
	BJ-32499— 125			REGULARS-SCREW	30.00
	BJ-32526— 125			" "	24.94
	BJ-32527— 125			" "	24.94
	BJ-32528— 125			" "	24.94
	BJ-32529— 125			" "	24.94
	BJ-32530— 125			" "	24.94
	BJ-32531— 125			" "	24.94
	BJ-32532— 125			" "	24.94
	BJ-32533— 125			" "	24.94
	BJ-32534— 125			" "	24.94
	BJ-32535— 125			" "	24.94
	BJ-32542— 250			" "	49.87
Feb.	9—BJ-32495— 125	2½x6		REGULARS T. W. CO. CELLS-SCREW (Atl. Gr.).....	26.25
	BJ-32585— 125	2½x6		REGULARS-SCREW	26.25
	BJ-32643— 125	2½x6		" "	24.94
	BJ-32644— 125	2½x6		" "	24.94
	BJ-32645— 125	2½x6		" "	24.94
	BJ-32646— 125	2½x6		" "	24.94
	BJ-32647— 125	2½x6		" "	24.94
	BJ-32648— 125	2½x6		" "	24.94
	BJ-32649— 125	2½x6		" "	24.94
Feb.	10—BJ-32657— 125	2½x6		REGULARS-SCREW	30.00
Feb.	11—BJ-32664— 125			RED LABEL COL. SCREW...	30.00
Feb.	14—BJ-38694— 125			RED LABEL " "	26.25
Feb.	16—BJ-32914— 125			REGULARS-SCREW	24.94
	BJ-32923— 125			" "	24.94
	BJ-38605— 125			CONNECTICUT CELLS-SCREW.....	30.00
	BJ-38718— 125			REGULARS-SCREW	30.00
Feb.	17—BJ-32792— 125			REGULARS-SCREW	30.00
	BJ-32794— 125			" "	30.00
	BJ-32810— 125			" "	26.25
	BJ-38715— 125			" "	30.00

[99—100] 1916.		Amount of Invoice.
Feb. 18	BJ-46270—125 REGULARS-SCREW	30.00
Feb. 19	BJ-32851—125 REGULARS-SCREW	24.94
	BJ-32913—500 " "	99.75
	BJ-32915—125 " "	24.94
	BJ-32916—750 " "	149.62
	BJ-32948—125 ATLANTICS "	23.93
	BJ-33062—125 REGULARS "	26.25
	BJ-46243—250 " "	60.00
	BJ-46299—125 " "	26.25
Feb. 21	BJ-32984—250 REGULARS-SCREW	55.37
	BJ-32985—125 " "	27.68
	BJ-33097—125 " "	24.94
Feb. 24	BJ-33191—125 REGULARS-SCREW	26.25
	BJ-33282—125 " "	26.25
Feb. 25	BJ-33092—125 "B. F. J." CELLS-ATL. GR. SCREW	24.38
	BJ-33132—125 REGULARS-SCREW	30.00
	BJ-46290—125 REGULARS-SCREW	24.94
Feb. 26	BJ-33024—300 EXETER CELLS, ATL. GR. SCREW	55.50
Feb. 28	BJ-33276—125 RED LABEL COL. CELLS SCREW.	26.25
	BJ-33393—250 " " " " "	49.87
	BJ-33451—125 REGULARS-SCREW	26.25
Mar. 6	BJ-33734—125 RED LABELS REGULARS-SCREW	30.00
Mar. 14	BJ-34152—125 REGULARS-SCREW	30.00
Mar. 24	BJ-39100—375 REGULARS, SCREW	74.81
Mar. 25	BJ-37922—500 REGULARS, SCREW	99.75
	BJ-37977—250 " "	55.37
	BJ-39018—125 " "	26.25
	BJ-37978—125 " "	27.68
Mar. 27	BJ-39127—125 ATLANTICS-SCREW	23.13
		$8,052.03
	Value of goods returned.....$70.62	
	Credits allowed acct. complaints from customers re bad cells 150.40	221.02
		$7,831.01

(Deposition of Anson J. Mitchell.)

[101] Q. Were these the same batteries that were shipped from your Cleveland plant?

Same continuing objection and motion.

Same exception.

A. They were.

Deposition of Francis G. Coxon, for Libelant.

[102] FRANCIS G. COXON, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

(By Mr. WELLES.)

Q. Captain, what is your business?

A. I am marine surveyor.

Q. Have you ever had any experience on the sea?

A. Oh, yes, since 1876 until 1907.

Q. State briefly what your experience has been?

A. Apprenticeship four years and officer and master from 1881, officer and master of British ships until 1907, at which time I was Marine Surveyor in the port of New York, and since 1904 Marine Surveyor in the port of New York.

Q. What experience have you had on steamers of the tramp type and steam schooner type?

A. Steam schooners, I have had experience on more or less during that time, in tramp and passenger steamers, cargo and passenger steamers.

Q. Has your experience been both on wooden and steel vessels?

A. Iron and steel vessels only, no wooden vessels; I have never been on a wooden vessel; sailing ships and steamers.

(Deposition of Francis G. Coxon.)

Q. What experience have you had with vessels in the tropics?

A. For 28 years I have been in the Brazil trade, connected with ships in the north Brazil trade.

Q. Where did you sail to from Brazil?

A. Mostly from [103] northern ports, the Amazon, down as far as Pernambuco.

Q. Sailed from the United States, and to and from the United States? A. Yes.

Q. Made regular trips from the United States to Brazilian ports? A. Yes, regular trips.

Q. Are you familiar with conditions in the holds of vessels making such trips? A. Yes.

Q. In cargo vessels? A. Yes.

Q. Assuming that a steel screw steamer of in the neighborhood of 2122 tons, left Philadelphia about September 16th, 1915, and arrived at Colon in the Panama Canal Zone about September 29th, 1915, a period of approximately 13 days, and that she stayed at Colon till about November 5th, a period of approximately 37 days, would the heat conditions in her hold be higher than if she had sailed through the Panama Canal and arrived at California ports about 21 days from leaving Philadelphia?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, as the witness has not shown that he ever visited the port of Colon or the Panama Canal or the waters immediately adjacent to either the east or west coast of Panama.

Exception.

A. I should say that the vessel being at anchor or

(Deposition of Francis G. Coxon.)

lying still in the port, the ventilation in the holds [104] would not be the same as if she was proceeding.

Q. What would the conditions as to heat in the holds be?

Mr. PLATT.—Same objection as to the last preceding question.

Same exception.

A. In hot weather while the vessel is lying still the heat in the holds would naturally be higher than if she was proceeding.

Q. Is the temperature of Colon approximately the same as the temperature at the points to which you have been calling in your experience?

Same objection and exception.

A. I should say practically about the same.

Q. Is the temperature generally the same through these waters in the tropics?

Same objection and exception.

A. It is not the same in all localities, naturally.

Q. Is there any very great difference?

Same objection and exception.

A. Not a great deal, no.

Q. Is it very warm at Colon in the months of September, October and November?

Same objection and exception.

A. Yes, I assume it would be the same.

[105] Q. How does it compare with our summer heat in New York and summer heat at ports such as Portland and San Francisco?

Same objection. Same exception.

(Deposition of Francis G. Coxon.)

A. I would assume at Portland it would be much cooler.

Q. How would it compare with heat at New York?

Same objection. Same exception.

A. It would be warmer, I consider, in those months at Colon than it would be at New York at the same time.

Q. Would it be warmer than our ordinary summer temperature in August?

Same objection. Same exception.

A. No.

Q. Would it be about the same?

A. About the same.

Q. Would the heat in the holds be greater if the vessel had no ventilators than if she had ventilators?

A. Yes.

Q. Would it make any difference to a vessel without ventilators, whether she was standing still or traveling? A. Yes, there would be a difference.

Q. What would the difference be?

A. The difference would be she would be cooler proceeding.

Q. Any vessel would be cooler under way?

A. Better means of cooling the hold.

Q. That would apply to any kind of vessel?

A. Yes, any kind of vessel.

[106] Q. Would it be true that the longer a vessel stayed at the dock, or stayed at rest at a place like Colon the hotter the holds would get?

A. Yes, I would say that the heat would accumulate; it would retain its heat.

Deposition of Edwin J. Wilson, for Libelant.

[107] EDWIN J. WILSON, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

(By Mr. WELLES.)

Q. What is your connection, if any, with the National Carbon Company, the libelant in this action?

A. Manager of the eastern works of the National Carbon Company, the factory being in Jersey City, New Jersey.

Q. Do you recall a shipment of batteries that came to your plant from New Orleans in the early part of December, 1915? A. Yes.

Q. Where did that shipment originate from?

A. From New Orleans.

Q. What was done with that shipment?

Mr. Platt.—Objected to on the ground that it is incompetent, irrelevant and immaterial, because under the testimony heretofore introduced the deterioration in the value of the subject of the shipment by the libelant upon the SS. "Eureka" was due to causes specifically excepted in the bill of lading under which the goods were shipped, to wit, deterioration arising from heat and confinement in the hold of the vessel, both in and of themselves, and as connected with the prolongation of the voyage, which was likewise within the [108] exceptions of the terms of the bill of lading, and due likewise to the deterioration in value or deterioration in quality, or both, due to the inherent character of the commodity under carriage, from any liability for

(Deposition of Edwin J. Wilson.)

which the carrier was expressly excepted by Clauses 1, 2, 3 and 8 of the bill of lading, Libelant's Exhibits 1, 3 and 5, and the benefit of each and all of which provisions is expressly claimed by the vessel and the claimant, as well as all other provisions of the bill of lading, whether specifically enumerated or not, and for each and all of these reasons the question is incompetent, irrelevant and immaterial; which objection the claimant at this time makes to each and all of the inquiries relating to damage to the cargo, deterioration in quality, depreciation in value, or any other shrinkage or loss in market value of every kind and nature, without renewing its objection to each and every succeeding inquiry of the same character, and in addition thereto, the carrier and the claimant places the same objection in the record, as a motion to strike out as incompetent, irrelevant and immaterial each and every answer relating to proof of damage on the same grounds and for the same reasons, where the **[109]** form of the question does not indicate in advance that the question of damage is the question under consideration, and makes this motion as a continuing motion to each and all answers relating to the question of damage, without the necessity of renewing the said motion to each and every answer wherein the subject matter of the answer is in whole or in part the question of damage, depreciation, deterioration, shrinkage, or loss of market or other value.

Mr. WELLES.—Same exception as heretofore.

A. It was first unloaded from the cars, checked up,

(Deposition of Edwin J. Wilson.)

tested, reconditioned, and shipped out on orders.

Q. Was it shipped out as first-class goods?

Same objection. Same exception.

A. Not altogether.

Q. Was the shipment in good condition when it reached your plant?

Same objection. Same exception.

A. No.

Q. Was its condition such that it was necessary to recondition it?

Same objection, motion and exception.

A. Yes.

Q. Did you see the shipment? A. Yes.

[110] Q. Did you issue orders for reconditioning it?

Same objection, motion and exception.

A. Yes.

Q. Are all batteries marked when they leave your factory with the date and class or grade? A. Yes.

Q. Have you been in the other plants of the company? A. Yes.

Q. Have you been in the Cleveland plant?

A. Yes.

Q. Is that same custom maintained at the Cleveland plant? A. Yes.

Q. Are old batteries as readily salable as ones just put out by the factory? A. No.

Q. Does your plant ever ship for export trade or for shipment to the Pacific coast any but first-class batteries?

Mr. PLATT.—Same continuing motion and objec-

(Deposition of Edwin J. Wilson.)

tion. Objected to further on the ground that it is immaterial what the Jersey City plant does as the Cleveland plant is the plant from which it is claimed that these goods were shipped.

Same exception.

A. No, we do not.

Q. When these goods left your factory were they of a class that was suitable for shipping for export or for California ports?

Same continuing objection and motion and same [111] objection as to the last question.

Same exception.

A. No.

Q. For what reason?

Same objections and motion. Same exception.

A. We did not consider them good enough for shipment to those points, in fact, we made it a point not to ship any, not even to southern points where the climate is warm.

Q. Does it require a specially high grade of batteries for export to California points?

Same objections and motion. Same exception.

A. It does.

Q. Will you please state in detail the batteries that were sent out from your plant, and the dates of such shipments which arrived from New Orleans as you have stated?

Same continuing objection and motion.

Same exception.

A. 1916.

Jan. 11—	BJ-31323—	125	2½x6	IGNITORS-SCREW
	BJ-31342—	125	2½x6	" "
	BJ-31347—	125	2½x6	" "
	BJ-31356—	125	2½x6	" "
	BJ-31359—	125	2½x6	" "
	BJ-31368—	125	2-x6	REGULARS-SCREW
	BJ-31369—	125	2½x6	IGNITORS-SCREW
	BJ-31376—	125	2½x6	" "
	BJ-38087—	125	2½x6	" "

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Jan. 12—	BJ-31330—	125	2½x6	GLOBE-SCREW
	BJ-31334—	125	2½x6	REGULARS-SCREW
	BJ-31349—	125	2½x6	IGNITORS-SCREW
	BJ-31361—	125	2½x6	" "
	BJ-31363—	125	2½x6	" "
	BJ-31380—	125	2½x6	" "
	BJ-31390—	125	2½x6	" "
	BJ-31400—	125	2½x6	" "
	BJ-31406—	250	2½x6	REGULARS-SCREW
	BJ-31424—	125	2½x6	IGNITORS-SCREW
	BJ-31432—	125	2½x6	" "
	BJ-31441—	125	2½x6	" "
	BJ-37701—	125	2½x6	" "
	BJ-37702—	125	2½x6	" "
	BJ-38078—	125	2½x6	" "
Jan. 13—	BJ-31394—	125	2½x6	IGNITORS-SCREW
	BJ-31412—	125	2½x6	" "
	BJ-31415—	125	2½x6	" "
	BJ-31422—	125	2½x6	" "
	BJ-31426—	125	2½x6	" "
	BJ-31433—	125	2½x6	" "
	BJ-31443—	125	2½x6	" "
	BJ-31445—	125	2½x6	" "
	BJ-31449—	125	2½x6	" "
	BJ-31464—	125	2½x6	" "
	BJ-31475—	125	2½x6	" "
	BJ-31478—	125	2½x6	" "
	BJ-31489—	125	2½x6	" "
	BJ-31499—	125	2½x6	" "
	BJ-31500—	125	2½x6	" "
	BJ-37521—	125	2½x6	" "
	BJ-37522—	125	2½x6	" "
	BJ-37704—	500	2½x6	REGULARS-SCREW
	BJ-38077—	125	2½x6	ATLANTICS-SCREW
	BJ-38105—	125	2½x6	IGNITORS-SCREW
	BJ-38109—	125	2½x6	" "
	BJ-38118—	125	2½x6	" "
	BJ-38131—	125	2½x6	" "

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Jan. 14—	BJ-31467—	125	2½x6	IGNITORS-SCREW	
	BJ-31476—	125	2½x6	"	"
	BJ-31477—	125	2½x6	"	"
	BJ-31507—	125	2½x7	"	"
	BJ-31509—	125	2½x6	"	"
	BJ-31515—	125	2½x6	"	"
	BJ-31521—	125	2½x6	REGULARS-SCREW	
	BJ-31522—	125	2½x6	"	"
	BJ-31523—	750	2½x6	"	"
	BJ-31524—	125	2½x6	"	"
	BJ-31525—	125	2½x6	"	"
	BJ-31536—	125	2½x6	IGNITORS-SCREW	
	BJ-31541—	1250	2½x6	"	"
	BJ-37711—	625	2½x6	REGULARS-SCREW	
	BJ-38112—	125	2½x6	IGNITORS-SCREW	
	BJ-38113—	125	2½x6	"	"
Jan. 15—	BJ-31528—	125	2½x6	IGNITORS-SCREW	
	BJ-31529—	125	2½x6	"	"
	BJ-31535—	125	2½x6	"	"
	BJ-31538—	125	2½x6	"	"
	BJ-31539—	125	2½x6	"	"
	BJ-31566—	125	2½x6	"	"
	BJ-31571—	125	2½x6	"	"
	BJ-31585—	2500	2½x6	"	"
	BJ-31608—	125	2½x6	"	"
	BJ-37703—	125	2½x6	"	"
	BJ-37726—	125	2½x6	"	"
Jan. 17—	BJ-31462—	125	2½x6	REGULARS-SCREW	
	BJ-31514—	125	2½x6	ATLANTICS-SCREW	
	BJ-31626—	125	2½x6	IGNITORS-SCREW	
	BJ-31639—	125	2½x6	"	"
	BJ-38074—	125	2½x6	"	"
Jan. 18—	BJ-31657—	125	2½x6	IGNITORS-SCREW	
	BJ-31670—	500	2½x6	REGULARS-SCREW	
Jan. 19—	BJ-38208—	125	2½x6	IGNITORS-SCREW	

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Jan. 20—	BJ-31760—	125	2½x6	REGULARS-SCREW
	BJ-31764—	125	2½x6	" FAHN.
	BJ-31772—	125	2½x6	" "
	BJ-31788—	125	2½x6	" SCREW
	BJ-31805—	125	2½x6	" "
	BJ-37722—	125	2½x6	" "
	BJ-38194—	125	2½x6	CONNECTICUT-SCREW
	BJ-38249—	125	2½x6	REGULARS-SCREW
Jan. 21—	BJ-31828—	125	2½x6	REGULARS-SCREW
	BJ-31855—	1250	2½x6	" FAHN.
	BJ-38227—	375	2½x6	" SCREW
Jan. 25—	BJ-31926—	125	2½x6	REGULARS-SQ. C. SCREW
	BJ-31978—	125	2½x6	" SCREW
	BJ-32001—	125	2½x6	" "
Jan. 27—	BJ-31972—	8	0-4	COLUMBIA CELLS
	BJ-32011—	125	2½x6	REGULARS-SCREW
	BJ-32061—	250	2½x6	" "
	BJ-32089—	250	2½x6	" "
	BJ-32094—	125	2½x6	" FAHN.
Jan. 28—	BJ-31964—	250	2½x6	ATLANTICS-SCREW
	BJ-32077—	125	2½x6	REGULARS-SCREW
	BJ-32085—	125	2½x6	" "
	BJ-32111—	125	2½x6	IGNITORS-SCREW
	BJ-32114—	125	2½x6	REGULARS-SCREW
	BJ-32116—	125	2½x6	" "
	BJ-38378—	125	2½x6	" FAHN.
	BJ-38400—	125	2½x6	" SCREW
Jan. 29—	BJ-32080—	125		EASTERN-SCREW
	BJ-32106—	125		REGULARS-SCREW
	BJ-32217—	125		" "
	BJ-32221—	125		IGNITORS-SCREW
	BJ-38330—	125		REGULARS-SCREW
	BJ-38401—	125		" "
	BJ-32090—	625		ROYAL BLUE CELLS

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Jan.	31—BJ-32048—	125	IGNITORS-SCREW
	BJ-32124—	125	REGULARS-SCREW
	BJ-32134—	125	RED LABEL REGS. SCREW
	BJ-32189—	125	IGNITORS-SCREW
	BJ-32248—	125	REGULARS-SCREW
	BJ-32254—	125	IGNITORS-SCREW
	BJ-32266—	125	" "
	BJ-38391—	125	ATLANTICS-SCREW
	BJ-38460—	625	REGULARS-SCREW
	BJ-38461—	125	IGNITORS-SCREW
	BJ-32279—	125	REGULARS-SCREW
Feb.	1—BJ-32249—	125	REGULARS-SCREW
	BJ-38441—	125	GLOBE CELLS-SCREW
Feb.	2—BJ-32206—	800	REGULARS-SCREW
	BJ-32282—	375	ATLANTICS-SCREW
	BJ-32290—1000		REGULARS "
	BJ-32303—1000		EXETER CELLS "
	BJ-32350—	125	REGULARS-SCREW
	BJ-32361—	125	" "
	BJ-38485—	125	" "
	BJ-38538—	125	" "
Feb.	3—BJ-38575—	125	REGULARS-SCREW
Feb.	4—BJ-32401—	125	REGULARS-SCREW
Feb.	5—BJ-32439—	250	REGULARS-SCREW
	BJ-38622—	125	" "
Feb.	7—BJ-32268—	250	REGULARS-SCREW
	BJ-32523—	125	" "
Feb.	8—BJ-32408—	125	EASTERN CELLS-SCREW
	BJ-32499—	125	REGULARS-SCREW
	BJ-32526—	125	" "
	BJ-32527—	125	" "
	BJ-32528—	125	" "
	BJ-32529—	125	" "

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Feb. 8—BJ-32530— 125 REGULARS-SCREW
BJ-32531— 125 " "
BJ-32532— 125 " "
BJ-32533— 125 " "
BJ-32534— 125 " "
BJ-32535— 125 " "
BJ-32542— 250 " "
Feb. 9—BJ-32495—2½x6 "T. W. CO." CELLS-SCREW (ATL. GR.)
BJ-32585— 125 2½x6 REGULARS-SCREW
BJ-32643— 125 2½x6 " "
BJ-32644— 125 2½x6 " "
BJ-32645— 125 2½x6 " "
BJ-32646— 125 2½x6 " "
BJ-32647— 125 2½x6 " "
BJ-32648— 125 2½x6 " "
BJ-32649— 125 2½x6 " "
Feb. 10—BJ-32657— 125 2½x6 REGULARS-SCREW
Feb. 11—BJ-32664— 125 RED LABEL COL. SCREW
Feb. 14—BJ-38694— 125 RED LABEL COL. SCREW
Feb. 16—BJ-32914— 125 REGULARS-SCREW
BJ-32932— 125 " "
BJ-38605— 125 CONNECTICUT CELLS-SCREW
BJ-38718— 125 REGULARS-SCREW
Feb. 17—BJ-32792— 125 REGULARS-SCREW
BJ-32794— 125 " "
BJ-32810— 125 " "
BJ-38715— 125 " "

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Feb. 18—BJ-46270—125 REGULARS-SCREW
Feb. 19—BJ-32851—125 REGULARS-SCREW
BJ-32913—500 " "
BJ-32915—125 " "
BJ-32916—750 " "
BJ-32948—125 ATLANTICS "
BJ-33062—125 REGULARS "
BJ-46243—250 " "
BJ-46299—125 " "
Feb. 21—BJ-32984—250 REGULARS-SCREW
BJ-32985—125 " "
BJ-33097—125 " "
Feb. 24—BJ-33191—125 REGULARS-SCREW
BJ-33282—125 " "
Feb. 25—BJ-33092—125 "B. F. J." CELLS-ATL. GR. SCREW
BJ-33132—125 REGULARS-SCREW
BJ-46290—125 REGULARS-SCREW
Feb. 26—BJ-33024—300 EXETER CELLS, ATL. GR. SCREW
Feb. 28—BJ-33276—125 RED LABEL COL. CELLS SCREW
BJ-33393—250 RED LABEL COL. CELLS SCREW
BJ-33451—125 REGULARS-SCREW
Mar. 6—BJ-33734—125 RED LABELS REGULARS-SCREW
Mar. 14—BJ-34152—125 REGULARS-SCREW

(Deposition of Edwin J. Wilson.)

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Mar. 24—	BJ-39100—375	REGULARS-SCREW
Mar. 25—	BJ-37922—500	REGULARS-SCREW
	BJ-37977—250	" "
	BJ-39018—125	" "
	BJ-37978—125	" "
Mar. 27—	BJ-39127—125	ATLANTICS-SCREW

[119] Cross-examination by Mr. PLATT.

Q. How many years have you been engaged in the manufacture of dry battery cells?

A. About 15 years.

Q. What is the estimated life of your first quality dry battery cells as put out to the trade?

Mr. WELLES.—Libelant objects, as the witness is not qualified as an expert.

A. I do not care to express myself on that.

Q. Is your unwillingness to express yourself on this subject due to lack of knowledge or lack of information?

A. Lack of knowledge or lack of information, that is the same thing.

Q. Lack of information or lack of technical knowledge? A. Sales information.

Deposition of William A. Richey, for Libelant.

[120] WILLIAM A. RICHEY, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

(By Mr. WELLES.)

Q. What is your connection with the National Carbon Company, if any?

A. Chemist in the eastern works of the National Carbon Company.

(Deposition of William A. Richey.)

Q. Where are those works located?

A. 14th and Henderson Streets, Jersey City, New Jersey.

Q. Is that the same plant that Mr. Wilson has charge of? A. It is.

Q. How long have you been connected with the National Carbon Company?

A. Four years the first day of last August.

Q. Are you conversant with the manufacture and construction of electric dry cells and their testing?

A. I am.

Q. Have you been doing that sort of work over there during the time you have been with them?

A. I have.

Q. Do you recall a shipment of dry cells which arrived from New Orleans in the early part of December, 1915? A. I do.

Q. Can you tell us when those arrived at the plant in Jersey City?

A. They arrived on December 6, 1915.

Q. What did that shipment consist of?

A. According to the report I had on it from our stockroom it consisted of 348 barrels and 12 boxes.

[121] Q. Did your own examination agree with that report?

A. It did; we found the report the same as the stockroom.

Q. You found all those barrels in the stockroom when you examined them? A. Yes, sir.

Q. Can you tell what railroad cars those shipments arrived in? A. I cannot.

(Deposition of William A. Richey.)

Q. Did you examine this shipment in detail?

A. I examined the shipment barrel for barrel and opened each box and made a careful examination of all of them.

Q. Did you test and grade the cells?

Mr. PLATT.—I make the same objection as heretofore stated to Mr. Mitchell's and Mr. Wilson's testimony (pp. 87 and 107).

Same exception.

A. Yes, these cells were tested and graded under my supervision.

Q. You attended to the work personally, did you?

A. Yes, sir.

Q. How were these packages of cells made up?

A. These cells were packed in the standard sugar barrel, we call it.

Q. Describe their condition as you opened the barrels?

A. A layer of straw under the cover of perhaps 3 inches thick, then came one layer of batteries; around this layer of batteries the straw was packed in solider and beneath the [122] top layer was another layer of straw, and then there was a second layer of batteries. This was also packed around the outside as in the first case. Then beneath the second layer was another layer of straw and then a third layer of batteries, and so on. You might say that the three layers constituted the barrel and beneath the bottom layer was another layer of straw.

Q. How thick was the layer of straw in the bottom? A. About three inches, I should say.

(Deposition of William A. Richey.)

Q. Was there a head on the barrel, a closed barrel with a head on it?

A. Yes, the barrel had a head.

Q. How were the boxes packed?

A. The boxes were packed in boxes approximately 2 feet by 18 inches by one foot, or approximately that, I would not say exactly; these were packed in excelsior in two layers.

Q. With excelsior all around the batteries?

A. Around the two layers of batteries.

Q. The batteries all stood on end? A. Yes, sir.

Q. Both in the boxes and in the barrels?

A. Yes, sir.

Q. What was the condition of the boxes and barrels when you found them, any damage?

Same objection and motion. Same exception.

A. As to external conditions we found 24 of the barrel heads broken in. The boxes were in first-class condition.

Q. When you opened the packages what did you find as to general conditions inside? Any signs of damage?

[123] Same objection and motion. Same exception.

A. We found on removing the cells that the greater part of the cells showed straw marks, that is, marks as to the impression made by the straw on the seals, which is only caused by the seal softening under the influence of heat.

Q. Did you find any defects in the jackets?

Same objection and motion. Same exception.

(Deposition of William A. Richey.)

A. The jackets in a great many cases—I should say one per cent of the cells, showed the jackets were wet or moist, due to leakage of the cells. This leakage you might say is produced when the cell is subjected to heat, causing the solution, under the pressure of expansion, due to heat—causing it to force out of the battery. We found the jackets were wet, due to this rather than to external wetness.

Q. Did you find any bulged seals.

Same objection and motion. Same exception.

A. We found about one per cent. This was only produced under extreme active cell conditions, that is, where the cell is subjected to an active internal action, the chemicals act more violently under the influence of heat, causing expansion of the solution in the cells and also causing generation of gas in the cells and the expansion of these will produce a bulging of the seal. The bulging is also made greater by the softening of the seal.

[124] Can you tell whether this was due to heat or what it was due to?

Same objection and motion. Same exception.

A. Any bulging I have ever seen in my experience in examination of cells has been caused from heat, either external heat or heat due to the action of chemicals in the cells.

Q. Could you judge in this case whether it was external heat or heat due to the chemicals?

Same objection and motion. Same exception.

A. It is my opinion that the bulging in this case was due to the greater action of the chemicals in the

(Deposition of William A. Richey.)

cell, caused by the excessive external heat.

Q. Did you see any other signs of excessive external heat on these batteries?

Same objection and motion. Same exception.

A. I cannot think of anything just now.

Q. Did you find any corroded caps?

Same objection and motion. Same exception.

A. We found about one-half of one per cent where the brass caps showed corrosion. This corrosion you might say was caused from the action solution of the cell being forced out in the heating or expansion, and reacting directly upon the cap, causing corrosion.

Q. Were any of the cells out of shape in any way?

[125] Same objection and motion. Same exception.

A. Some of the cells found in one barrel were out of their circular shape, and had assumed an oval shape.

Q. Crushed or how?

Same objection and motion. Same exception.

A. As near as I could tell it was caused by pressure on the can when the seal was soft.

Q. Did you make an internal examination of these cells?

Same objection and motion. Same exception.

A. A portion of these cells, a representative portion, was opened, and an examination made internally to see the condition of the cells.

Q. Was there any sign of any foreign material in the cells?

(Deposition of William A. Richey.)

Same objection and motion. Same exception.

A. We found no trace of any foreign material that would cause the cells to depreciate on the shelf.

Q. Did the cells appear to have been properly made and put together in the first place from what you found?

Same objection and motion. Same exception.

A. I found the cells were made, as near as I could judge, according to the standard cell, and were apparently in first-class condition when they were shipped.

Q. Could you tell where these cells had originally come from?

A. I found the markings on the packing slips, and also the marking on the jackets of the batteries [126] indicated that the cells were originally shipped from our Cleveland factory.

Q. Could you tell from those whether the cells were first-class cells when they were shipped?

Same objection and motion. Same exception.

A. Everything indicated that these cells were first-class cells when they left the factory.

Q. It is the custom in all of your plants, is it not, to mark the grade of cell on the jacket?

Same objection and motion. Same exception.

A. It is.

Q. Did all of these cells that you saw show marks of that?

Same objection and motion. Same exception.

A. All these cells had a mark which was characteristic of that grade of cells.

(Deposition of William A. Richey.)

Q. Did you find any signs of deterioration in the inside of the cells when you opened them?

Same objection and motion. Same exception.

A. I found on the internal examination that the cells showed a depreciation. This was caused by the presence of a corrosion product, which we take as a sign that the cell has a marked depreciation due to excessive internal action.

Q. Could you judge in this case what was the cause [127] of the excessive internal action?

Same objection and motion. Same exception.

A. My opinion of the matter is that the action was caused by a long period of exposure to rather excessive heat. That is what the indications showed on the examination of the cells.

Q. Did you make an electrical test of these cells for electrical strength?

Same objection, motion and exception.

A. These cells were tested for electrical strength by a reading of the voltage and current, you might say, with a standard Western meter.

Q. Did they test up as first-class cells?

Same objection and motion. Same exception.

A. They did not test as first-class cells. There were a great many that read under what we would consider the reading of a first-class battery.

Q. Could these cells have been sold as first-class cells?

Same objection and motion. Same exception.

A. In order to sell these cells it was necessary, that is, in order to dispose of them it was necessary to do

(Deposition of William A. Richey.)

a great deal of work in repairing them, necessary to do a great deal of work on any of them before they could be considered at all marketable, but these cells were graded [128] into three classes. We found that in the first class were cells which were badly straw marked, and these would have to be treated, or what we call retorched, that is, the seal would have to be heated so that it made a smooth finish.

Q. What proportion of these cells required this reconditioning?

Same objection and motion. Same exception.

A. All the cells that were returned required reconditioning.

Q. What did that reconditioning consist of, briefly?

Same objection, motion and exception.

A. The reconditioning consisted in removing the jackets and retorching or redressing the seal and putting on new jackets.

Q. Did you have to refill or repack some of them?

Same objection and motion. Same exception.

A. No, the active materials of the cells themselves were not changed.

Q. How many of these cells showed deterioration of current?

Same objection and motion. Same exception.

A. These cells were examined and read for current. Those reading above the minimum that we accept were about 50%.

Q. About 50% had depreciated enough to take them out of the class of first-class cells? A. Yes.

(Deposition of William A. Richey.)

[129] (By Mr. PLATT.)

Q. The other 50% were all right as far as current is concerned? A. Yes.

(By Mr. WELLES.)

Q. What proportion of these cells had to be reduced to a lower class than first-class cells?

Same objection, motion and exception.

A. 50%.

Q. Would these batteries show a further deterioration subsequent to the date of your test, if they were tested a few weeks later?

Same objection, motion and exception.

A. The condition that the batteries were in when I tested them was such that there might be a further depreciation in say four weeks' time.

Q. Could you judge, from the appearance of the batteries as you saw them whether they had been subjected to a mild heat or a strong heat?

Same objection, motion and exception.

A. My opinion is that the batteries were subjected to about, I should say, 125 degrees Fahrenheit temperature.

Q. Could you judge how long they had been subjected to that temperature?

Same objection, motion and exception.

A. No, that was impossible to judge from the condition. [130] However, I might say that their condition was such as to indicate that the excessive action had continued for a length of time. I would not say just as to the number of days or weeks.

Q. You have examined shipments of cells that

(Deposition of William A. Richey.)

have come through the tropics and through locations similar to the canal zone, have you not?

A. I have seen cells that have been through the tropics.

Q. Did such cells under ordinary conditions of carriage show signs of deterioration by heat?

Same objection, motion and exception.

A. They did not. We make our cells to stand the ordinary conditions of transportation through the tropics. The seal is made at a melting point high enough so that it will stand tropical temperatures, or wherever we ship that particular cell.

Q. When a cell is subjected to heat, is the rate of deterioration any greater as the time it is exposed increases, or does it deteriorate at an even rate per day during the time it is exposed to heat?

Same objection, motion and exception.

A. During the first few days that a battery is exposed to heat there is an increased chemical action, but this action is accelerated as the time goes on, that is, if a battery was exposed to heat say a week the chemical action would no doubt be increased, but the action would be accelerated [131] in an equal period of time after that.

Q. Could you tell whether these batteries had ever been connected up or used at all?

Same objection, motion and exception.

A. There was nothing to indicate that the batteries had been connected up or had been used.

Q. If there had been, would you have noticed any external changes in the ones you examined inter-

(Deposition of William A. Richey.)

nally? A. I would, yes.

Q. They would show any use at all, would they?

Same objection, motion and exception.

A. They would show use.

Q. Could you conclude as to whether or not they had been used?

Same objection, motion and exception.

A. I would say that these batteries had not been used.

Q. Are you familiar with the packing slips that are used in the Cleveland factory?

A. I have seen those slips.

Q. Have you been in the Cleveland factory?

A. I have.

Q. Have you seen the slips there? A. I have.

Q. Are you familiar with the conditions in the Cleveland factory?

A. I have visited the Cleveland factory twice.

Q. Were these packing slips that were in these barrels the same as usually used in the Cleveland factory, at this [132] time? A. They were.

Q. Did they have on them the date of the shipment?

A. They did have on them the date of the shipment.

Q. Could you tell from them whether it was a fresh shipment?

A. As far as the packing slips go it would indicate that the batteries were a fresh shipment.

Q. Were there any entries of depreciation or deterioration on the packing slips?

(Deposition of William A. Richey.)

A. Nothing to indicate anything that would show the cells to be not up to the standard.

Q. For cells that are destined for export work, do you use any special quality?

Mr. PLATT.—Same continuing objection and motion, and on the further ground that it is incompetent as being too general, not being limited to the territory through which this shipment was to pass.

Exception.

A. We do; we use a special cell for the export trade.

Q. Do you use a special class of cell for shipment to California points by way of the Panama Canal?

Mr. PLATT.—Continuing objection and motion, and in addition thereto that it is immaterial as to what may be done in other cases, as what is done in other cases cannot bind the parties to [133] this action as to what was done in this case.

Exception.

A. It is the standard practice of all the factories to make special provisions or make a special cell, I should say, to meet the conditions that they would have to go through in passing to or from California by way of the canal.

Q. Is that a better cell than the one ordinarily put out?

A. It is designed specially to meet the heat conditions.

Q. Is it what is known as a first-class cell?

A. It is a first-class cell.

Q. Did the cells you examined show any signs of

(Deposition of William A. Richey.)

having the liquid in them dried out?

Same objection, motion and exception.

A. The cells examined in general showed a moist condition. However, there were some cells in which the chemical action was so great that the zinc, as we call it, the electrode, which dissolves, giving rise to the chemical action, had eaten through; in that case the cell had dried out. I might say that the effect of heat is not one that would cause the cell to dry out in particular, but it would stimulate the chemical action and the effect of the corrosion product is what causes the deterioration in the cell.

Q. Did you find any signs of this shipment having been wet or having come in contact with water?

[134] Same objection, motion and exception.

A. With the exception of one barrel that indicated a slight wetness of the packing material.

Q. Had that wetness caused any damage?

Same objection, motion and exception.

A. The wetness in this case had only caused a few of the jackets to be bleached.

Mr. WELLES.—You may examine him now, Mr. Platt.

Cross-examination by Mr. PLATT.

Q. Was there any chemical reason why part of this shipment was packed in straw and part in excelsior?

A. The ones that were packed in straw were the barrel lots, and the excelsior lots were packed in boxes.

Q. I asked if there was a chemical reason why

(Deposition of William A. Richey.)

some of them were packed in straw and some in excelsior. A. No, there is not.

Q. Do you know of any reason why they were differently packed or packed with different materials?

A. I cannot give the exact reason.

Q. Do you know any reason? A. No.

Q. Will you describe the chemical constituents of a dry battery cell such as were contained within this shipment?

A. The chemical constituents of a dry battery cell are carbon,—

[135] Q. In what form?

A. Carbon in the form of coke, petroleum coke, and also in the form of graphite.

Q. I meant by form, was it in a mix or a pencil or what?

A. Carbon in the form of a mix. The carbon is mixed with another constituent, manganese oxide or peroxide as it is called sometimes, to form a mix, and this is also an active material. Sal-ammoniac is also added to the mixture, and the material in the mix is moistened with a solution of zinc chloride. That constitutes the active materials in the cell. Then we have two electrodes, a carbon electrode and a zinc can, which makes up the negative chamber.

Q. In other words, if I understand you correctly, you have a zinc can and a carbon centre piece or pencil?

A. Yes, you might call it a pencil.

Q. Surrounded by a mixture containing the chem-

(Deposition of William A. Richey.)

ical constituents in the form of a mass, which you have detailed? A. That is correct.

Q. Which, apart from the quantities of each, constitute all of the ingredients contained within that dry battery cell except the various elements?

A. Yes, and separating the mixture from the zinc can, of course, is a porous lining.

Q. Of what material?

A. Pulp board, wooden.

Q. Then the zinc can does that enter into the [136] chemical action? A. It does.

Q. This mass in this container, surrounding this carbon pencil, is pressed down and sealed in, with the internal wire connections forming a dry battery cell?

A. Forming a dry battery cell; the wire connections, of course, have nothing to do with the dry battery, a dry battery is simply equipped with terminals for external connections.

Q. Equipped with terminals to which the wires are attached? A. Yes.

Q. There is a certain element of liquefaction or liquification, so to speak, of this mass, due to the elements?

A. The mass is moistened, yes, the material is moistened so as to promote diffusion.

Q. As I understand it, to prevent the evaporation of that liquification or liquefaction, the lower and upper ends of this cylindrical device are sealed with some sort of sealing material?

A. The *zonc* can, which constitutes the material for one electrode, is made with a metal bottom, and

(Deposition of William A. Richey.)

this mix is packed into the can around the electrode and the top is sealed.

Q. Around the other electrode?

A. Yes, tamped in around the carbon pencil.

Q. Which is the second electrode?

A. Which is the other electrode, yes.

[137] And then the top of the can is sealed?

A. The top of the can—we put on the top a seal which holds the mass permanently together, as well as prevents evaporation of the solution in the cell.

Q. What is that material composed of which is used to seal the device, as you describe it?

A. It is composed of pitch and rosin, with certain other materials.

Q. Give us the materials and the method of manufacture of the seal, in addition to the ingredients already mentioned?

Mr. WELLES.—Object to the question as being incompetent, irrelevant and immaterial, and not pertinent to the testimony of this witness upon the issues in this action.

A. The method of manufacture is to mix the ingredients that go into the seal and melt them together and pour them into the space left in the battery and to allow it to cool. The ingredients are pitch, rosin and certain other ingredients which are a trade secret and which I do not care to disclose at the present time without the express consent of my employers.

Q. As a witness under oath, called and placed upon the stand by the libelant in this case, and now under

(Deposition of William A. Richey.)

cross-examination, I make a formal demand upon you to answer in full the question as to what ingredients, giving the [138] quantities of each, which went into and constituted the seal which was placed upon each and every one of the dry battery cells contained within the shipment, Libelant's Exhibits 1, 3 and 5, which it was alleged in the libel were damaged while in the possession of the steamship "Eureka"?

Mr. WELLES.—Counsel for libelant calls attention to the fact that this information came to the witness in a professional capacity and that the witness desires to consult his employers before answering. Further, that it is not shown that the witness has anything to do with the making of the cells and for these reasons the question is objected to.

Q. You were familiar, were you not, Mr, Richey, with the chemical constituents and method of manufacture of the seals used upon each and all of the dry cells which were the subject of the shipment on the steamship "Eureka," Libelant's Exhibits 1, 3 and 5?

Wr. WELLES.—The question is objected to on the grounds previously stated, and for the further reason that it is not shown that this witness had anything to do with the making of the particular seals in question.

A. With regard to this shipment referred to, I can [139] make no statement regarding the seal that was put upon those batteries.

Q. What do you mean by that answer?

Same objection.

(Deposition of William A. Richey.)

A. I mean that I am acquainted with the material that goes into the seal at our factory, which, as far as I know, is the material used at the other factories.

Q. Did you not testify on direct examination that the National Carbon Company pursues the same methods and uses the same materials in the manufacture of dry battery cells at all its factories?

Mr. WELLES.—Objected to as the testimony speaks for itself.

A. As far as I know, their methods of manufacture are the same in all the factories.

Q. And the ingredients the same?

A. The ingredients the same.

Q. Have you any reason to believe from your experience as a chemist, and your examination of the cells which were the subject of this shipment, that the cells contained therein were made by any different method of manufacture or contained any different ingredients from those manufactured at the plant with which you are immediately connected?

A. I have not.

Q. Based upon your experience as a chemist, and particularly [140] your experience in the manufacture of carbon dry cells, state whether it is your professional opinion that the seals used upon the dry batteries which were the subject of this shipment were made by the same method and by the use of the same ingredients as those manufactured under your immediate supervision in the east Jersey plant of the libelant?

Same objection.

(Deposition of William A. Richey.)

A. They were so far as I could tell.

Q. Now, Mr. Richey, with this information at hand, will you state at this time the ingredients, giving the name of each, both the chemical name and the name in common usage, if different from the chemical name, of each and every ingredient, together with the quantity thereof, that entered into the manufacture of the seals used upon the dry cells which are the subject matter of this shipment which you examined, as you have heretofore stated?

Mr. WELLES.—Objected to for the reasons previously stated, and because the witness has already answered this question. The witness' attention is called to the fact that in response to that question he stated that he would want to get the consent of his employers before answering, on the ground that the ingredients and method of manufacture are a trade secret, and for that reason counsel [141] directs the witness not to answer this question at this time. Counsel further states that he is willing to give ample opportunity to cross-examine at a later date.

Q. You have heretofore testified, as I understand you, that in the manufacture of dry cells the National Carbon Company manufactures cells different in certain respects, depending upon the temperature to which they are subsequently to be subjected; what is the maximum temperature that you have in mind in manufacturing those that are going to warm climates?

Objected to as incompetent, irrelevant and imma-

(Deposition of William A. Richey.)

terial and in no way relating to the cells in question.

A. In making cells which are to go to tropical regions we make the seal of a minimum melting point of 160 degrees Fahrenheit.

Q. If I understand the matter correctly, the dry battery is manufactured in other respects the same, whether it is going to a hot country or to a temperate climate, the difference in manufacture being confined solely to the seal, is that correct?

A. Not entirely.

Q. Is there, then, in addition to what you have already defined as the elements entering into the manufacture of the seals, an additional difference in the constituents [142] and elements of the dry battery itself, if it is intended to be shipped to tropical countries?

A. Special precaution is taken to increase the melting point of the seal where the seal is known to be exposed to such a heat.

Q. That was what I already understood you to say; I am now asking you whether or not, in the manufacture of a dry battery which is to go to a tropical climate there are any other additional precautions other than those connected with the manufacture of the seal?

A. Special precautions are taken to prevent what are termed leakages of the cells due to the effect of high heat.

Q. Are those connected with the cell?

A. No, with the seal.

Q. With the mix?

(Deposition of William A. Richey.)

A. They are connected with the manufacture of the mix.

Q. In other words, you either increase the quantities of some one or more of the elements of the mix or add others not in those used in temperate climates?

A. We do.

Q. Which, increase of quantity of those used in all dry cells or the introduction of additional chemical constituents?

A. We would make a slight difference in the amount of water that goes into the cell, the amount is slightly decreased.

Q. Is that the only change?

A. That is the only change in the mix.

[143] Q. That is the only change in the mix?

A. Yes.

Q. A slight diminution in the quantity of water?

A. A very slight diminution of the quantity of water.

Q. What would that be, expressed in percentages of the whole, as to the proportions and nature of the ingredients? A. About 10%.

Q. So, as I understand you, apart from the seal, the only difference in the manufacture of a dry cell to go to the tropics and that of one to go to your ordinary temperate zone, is a 10% decrease in the amount of water used in your mix? A. Yes.

Q. Now, Mr. Richey, you have testified that the seals used in the manufacture of your trade in the tropics are built to stand a minimum temperature of 160°; what is the maximum temperature that they

(Deposition of William A. Richey.)

can stand, expressed in degrees Fahrenheit?

A. The maximum temperature would be, I should say, the melting point of the seal; if the seal is melted they would dry out and depreciate very rapidly.

Q. At what temperature would the seal melt so as to permit the escape of the evaporable material in the tropical grade of cells?

A. As already stated, the melting point of the seal, the minimum is 160°; I should consider 160°. After they reach that temperature the seal would soften so much as to allow the moisture to [144] escape.

Q. You mean 160° is the maximum temperature to which they can be subjected, not the minimum?

A. The minimum would be the melting point of the seal, the maximum would also lie at the melting point, the maximum would also be the melting point.

Q. The maximum and the minimum are the same, then?

A. If I understand the question right, the melting point on the seal we would consider the minimum temperature that the battery would stand. When we manufacture for tropical shipments we figure that the melting point of the seal would be also the maximum temperature that that battery would go through and still be fit for use afterward.

Q. As I understood your testimony some time ago, you stated that in the manufacture of a dry cell for tropical use you built the cells, chemically, to stand a temperature of 160° Fahrenheit as the minimum, that is correct, is it not?

A. As a melting point.

(Deposition of William A. Richey.)

Q. Now I ask you how far above 160° Fahrenheit of temperature would you have to go to reach the danger point when the seals would melt so as to produce evaporation; what is the maximum?

A. When the melting point of the seal is reached, which we consider the minimum of 160°, the seal would be melted from the battery and after that point [145] the battery of course would dry out, and be unfit for service.

Q. What is the life, expressed in months, from the standard of the manufacturer, of dry battery cells such as those shipped on the S. S. "Eureka" for tropical carriage?

A. Judging from our own records at our factory we would say that six months after the date of manufacture the cells would give a reading which would be suitable to ship as a first class cell.

Q. Suppose, then, that a cell manufactured and reading at the expiration of six months as entitled to be shipped as a first class cell, was so shipped, and placed upon the shelves of a purchaser for resale under no unusual circumstances, what, in your experience, is the additional life of the cell?

A. I should say two months would be considered a period that the cells could be held without being unfit for resale.

Q. In other words, the merchantable life of a dry cell such as those shipped on the "Eureka," subjected to no unusual conditions, would be eight months from the date of manufacture?

A. I should say on the average.

(Deposition of William A. Richey.)

Q. In examining these cells that came back as to the straw marks concerning what you testified as showing on the seals, did you note any difference in the upper or interior layers as to the pressure of the straw marks, the identation [146] of the straw marks? A. No difference, practically the same.

Q. How much does a dry cell weigh?

A. Roughly, two pounds.

Q. And how many in a layer in a barrel?

A. One hundred and twenty-five are packed in a barrel.

Q. That is not what I asked you?

A. How many in a layer in a barrel, they are packed in three layers, 125 in a barrel, equally distributed among the layers.

Q. About 42 dry cells of two pounds each in a layer? A. Yes.

Q. In other words, about 84 pounds in each layer of dry cells? A. Practically that much.

Q. Your observation, from an examination of this shipment showed you, as I understand you, that the indentation in the seals was the same whether the seal had above it no weight except the straw inside the top of the barrel, or whether it had above it two layers weighing 42 pounds each, or a total of 84 pounds of weight, is that correct?

A. As far as I could see there was practically no difference in the depth of the marks.

Q. You have testified that 50% of this shipment of dry cells, as re-examined by you, as unloaded was—you either used the words first class condition or

(Deposition of William A. Richey.)

O.K. and that the other 50% were lowered in amperage below the [147] minimum which the company standardizes for its first class dry cells, is that correct?

A. Not correct, no; the idea is not correct in the question.

Q. Correct me.

A. The statement that I made was this: that there were about 50% that read above the minimum amperage for standard cells.

Q. And about 50% below.

A. About 50% below.

Q. How do you account chemically, for the result that out of a shipment of this size, subjected, as far as you or I know, or my learned friend on the other side— to no unusual conditions, while being unloaded and examined at this date mentioned, the shipment showed that it had fallen in amperage below the company's minimum to the extent of one-half, or 50% and the other 50% had not?

A. I account for that is this way, the cells when sent out would read not 26, but would read 32 or 33, therefore the best cells or the highest reading cells had deteriorated so that they came within the 26 limit, and the cells reading possibly within 27 limit deteriorated so that they had fallen below that, so there was a deterioration in all of the cells.

Q. A commercial deterioration of about 50%?

A. A commercial deterioration of about 50%.

Cross-examination suspended, but not closed [148] until the witness has an opportunity to con-

(Deposition of William A. Richey.)

sult with his principles. Further examination with reference to the manufacture and chemical constituents of the seal reserved.

Redirect Examination by Mr. WELLES.

Q. Mr. Richey, were these cells that you examined in Jersey City, this lot of cells, were they a class of cells destined for tropical use?

A. As far as I know they were.

Q. Did I understand you to testify that the tropical cells were destined for 160°?

A. I was judging that from the melting point of the seal alone.

Q. Were these particular cells the 160° class?

A. I cannot say that.

Q. If these cells were placed in the barrels and shipped or delivered on a shelf or anywhere else, is their life the same as you have testified to, six months?

A. Under the same conditions of temperature we expect the life to be the same.

Q. The shipping and packing makes no difference in the life, as I understand it?

A. Very slight, I should say. Of course that would be modified according to the shipping conditions. If the cells were handled roughly in shipping they would very likely show it in their readings.

[149] Q. So ordinarily, if these cells had reached California in about 20 or 30 days from the time they were shipped, you would not expect them to show any depreciation there at that time, would you?

(Deposition of William A. Richey.)

A. I would not expect them to show any depreciation beyond what cells would naturally undergo in that length of time.

Q. What proportion of depreciation would you expect the cells to undergo in a shipment in that time?

A. As soon as the cells are manufactured, of course, there is a chemical action at once. This is very slow at the beginning, and of course, if the cells are kept under proper conditions of heat for 30 days there would be—

Q. I didn't ask you that; if they went to California and arrived there in 20 to 30 days from the time they were shipped, going by way of the Panama Canal, what proportion would you expect to run below the test, in California?

A. I should say not over two per cent at the best.

[150] *United States District Court, Western District of Washington.*

NATIONAL CARBON COMPANY,

Libelant,

against

Steamship "EUREKA," Her Engines, etc.

Depositions taken in behalf of the libelant, on the 18th day of December, adjourned to the 19th day of December, 1916, at 10 A. M., at the office of the Philadelphia Shipping Company, Room 551, Bullitt Building, 135 South Fourth Street, Philadelphia, Pa., by agreement of counsel, pursuant to notice.

(Deposition of Charles Kurz.)

APPEARANCES:

Messrs. HARRINGTON, BIGHAM & ENGLAR (FRANK C. WELLES, Esq.), Proctors for Libelant.

Messrs. PLATT & PLATT (ROBERT TREAT PLATT, Esq.), Proctors for Claimant.

It is stipulated that the testimony may be taken by a stenographer, fees to be taxable as costs, signing waived.

[151] The witness Charles Kurz having appeared, his examination was waived by the claimant. The witness Charles Kurz was thereupon called as a witness for the libelant.

Deposition of Charles Kurz, for Libelant.

CHARLES KURZ, being duly sworn and examined as a witness in behalf of the libelant, testifies as follows:

(By Mr. WELLES.)

Q. Mr. Kurz, were you connected with L. Rubelli's Sons in 1915 and 1916? A. Yes, sir, I was.

Q. Was that concern a copartnership or a corporation?

A. It was a copartnership consisting of G. M. Rubelli and myself.

Q. Who was the managing partner? A. I.

Q. I show you Libelant's Exhibit 1 and ask you if that is the bill of lading of a shipment of the National Carbon Company on the S. S. "Eureka" in September 1915? A. It is.

Q. Where was that shipment made from?

(Deposition of Charles Kurz.)

A. New York.

Q. Whom is that bill of lading signed by?

A. By J. U. English.

Q. Who was Mr. J. U. English?

A. Mr. English was connected with the firm of Phelps Brothers & Company, New York.

Q. Who are Phelps Brothers & Company of New York?

A. Phelps Brothers & Company were our New York agents in this case.

[152] Q. The agents for this vessel in New York?

A. Yes.

Q. What position did Mr. English occupy with them? A. Clerk.

Q. I show you Libelant's Exhibits 3 and 5 and ask you what those are?

A. They are the bills of lading covering the shipments made out of Philadelphia on the steamship "Eureka."

Q. Whose shipments?

A. Shipments of the National Carbon Company.

Q. By whom are these bills of lading signed?

A. R. B. Bates.

Q. Who was Mr. Bates?

A. He was at that time assistant traffic manager for L. Rubelli's Sons.

Q. I show you a file of correspondence, telegrams, cables and other papers, and ask you if those were sent by the persons signing same, and received by the persons to whom they are addressed, on or about their dates?

(Deposition of Charles Kurz.)

A. They were, and I have initialed each one of them.

Q. I ask you if you have in your possession the originals of which copies are contained in this file?

A. No, I have not.

Q. Do you know where such originals are?

A. I do not.

Mr. WELLES.—I offer these letters, telegrams, cables and other papers initialed by Mr. Kurz in evidence.

Mr. PLATT.—Claimant makes no objection to the various documents comprised within the offer on account of their form, or as to whether or not they are original copies or translations, and admits that the translations were made by the witness Kurz, and that they were sent by the persons signing the same, and received by the persons to whom they were addressed in due course at or about the dates thereof, but as to their competency, materiality and relevancy he will make specific objection later on.

Q. Was the firm of L. Rubelli's Sons acting as agents for the steamship "Eureka" at that time?

A. Yes.

[153] Q. Was the freight for these shipments prepaid to you by the National Carbon Company?

A. Yes, sir, the freight was prepaid.

Q. What was the Quaker Line?

A. The Quaker Line was a trade name which L. Rubelli's Sons used in connection with the steamers they had sailing from Philadelphia to the Pacific Coast, and it was used in order to show the connec-

(Deposition of Charles Kurz.)

tion with Philadelphia, being the Quaker City.

Q. Who was Mr. H. M. Williams?

A. Mr. H. M. Williams was the president of H. M. Williams Company who chartered the S. S. "Eureka" from the Crossett Western Lumber Company for consecutive westbound trips over a period of one year. He was also the general manager of the Oregon-California Shipping Company, to whom the H. M. Williams Company sublet the "Eureka" under the same form and conditions of charter as the Williams Company had with the Crossett Western Lumber Company with the exception that it was $25 per day more.

Q. Did the Crossett Western Lumber Company own the "Eureka"?

A. No, they were the time charterers of the "Eureka." The steamer was owned by the Pacific Coast Company.

Q. Who was Mr. John J. Dwyer?

A. He is the western manager of Phelps Brothers & Company, located at Chicago.

Q. Was he, at the time these shipments were made?

A. He was then, yes, sir.

Q. Wasn't it a fact, Mr. Kurz, that there were 15 barrels short shipped in this shipment that were never [154] placed on board the "Eureka"?

A. Yes, sir.

Q. What was done with those fifteen barrels?

A. They were returned to the order of the National Carbon Company.

Q. Do you remember whether Mr. Mitchell came

(Deposition of Charles Kurz.)

down to Philadelphia about October 9th? A. I do.

Q. Did he have any discussion with you then relating to these shipments? A. He did.

Q. At that time did he offer to pay the expenses of unloading this cargo and landing the same at Colon?

Mr. PLATT.—Objected to on the ground that under the terms of the bill of lading a consignor or consignee, either one, has not any right to require the carrier to break a shipment at a point designated by him, and that under the evidence in this case as already brought out by the libelant the cargo was delivered to the libelant at the port of New Orleans and accepted by it, and it is incompetent, irrelevant and immaterial what he may have stated, demanded or requested at an earlier date than the said delivery and acceptance at New Orleans, and also incompetent, irrelevant and immaterial as not within the rights under the bill of lading as resting in any consignor or consignee, as more particularly set forth above; also incompetent, irrelevant and immaterial on the ground that the shipping agents were not such general [155] agents of the carrier named in the bill of lading, to wit, the Oregon-California Shipping Company, and no demand, request or negotiations with the witness or with the shipping agents would be a legal request, demand or notice to or upon the carrier or the vessel; which objection may be considered made as a continuing objection to all inquiries of a similar nature where the form of the question apprises counsel for claimant as to the answer to be expected, and where the form of the ques-

(Deposition of Charles Kurz.)

tion does not so disclose, may be considered as a motion to strike out the answer on the same grounds and for the same reasons.

Mr. WELLES.—Excepted to on the ground that it is incompetent, irrelevant and immaterial and based upon conclusions of law not warranted by the evidence. A. He did.

Q. Did he call upon you subsequently to that at Philadelphia, about October 23d? A. He did.

Q. Did he at that time repeat his offer?

Same objection. Same exception.

A. He did.

Q. Did he offer at that time to pay all costs and expenses of unloading and landing the goods at Colon?

[156] Same objection and same exception.

A. He did.

Q. Did he tell you at both of these times that these goods would be greatly damaged if they were not unloaded immediately at Colon?

Same objection and exception.

A. He did.

Q. How long would it ordinarily take the "Eureka" to go around to California by way of the Canal? A. About 30 days.

Q. How long would it take this vessel ordinarily to go around by way of the Straits of Magellan to California points? A. About 90 days.

Q. Could this vessel have gone around by way of Magellan?

A. She could, if she could have gotten oil, but there was not any oil available.

(Deposition of Charles Kurz.)

Q. Was it or not possible for the vessel to have made the Magellan trip? A. No.

Q. This vessel is an oil burning vessel, is she?

A. Yes, sir.

Q. Are you familiar with the S. S. "Eureka"?

A. Yes, sir.

Q. Has she any ventilators? A. No, sir.

Q. Did this vessel ever continue its voyage and go through the Canal?

A. She did not continue that voyage. She left Colon and went up to New Orleans and from New Orleans she came to New York under a charter to the [157] Southern Pacific Company.

Q. Did she return immediately to New Orleans or did she stay down there some time?

A. She stayed down there for some time.

Q. When she came to New Orleans did she discharge her cargo there? A. Yes, sir.

Q. Did you go down to New Orleans in connection with the discharge of her cargo? A. I did.

Q. Did you see the National Carbon Company shipments unloaded there, or part of them?

A. I saw the whole cargo on the pier, I must have seen the barrels, but I didn't take any particular interest in them, and I don't remember whether I saw the barrels or not.

Q. Did you see Mr. Mitchell testing this cargo of dry batteries at New Orleans?

A. No, I didn't see him test it, but he told me that he was going down, and I understood that he was on the pier testing the barrels.

(Deposition of Charles Kurz.)

Q. In New Orleans, you assisted in the unloading of the vessel and getting the cargo forward to destination? A. Yes, sir.

Mr. WELLES.—You may cross-examine.

Cross-examination by Mr. PLATT.

Q. The S. S. "Eureka" was an all steel vessel, was she not? A. Yes, sir.

Q. Without ventilators? A. Yes, sir.

[158] Q. Did you see the steamer when she left Philadelphia for the Canal Zone? A. Yes, sir.

Q. She had on her deck, did she not, a cargo of steel beams, a shipment, I mean?

A. She didn't have a cargo, she had a few beams on deck.

Q. Do you remember now, or can you, by consulting your manifest, tell how many tons there were in that deck cargo?

A. Yes, sir, we can; the exact weight was 68,400 pounds.

Q. How was that stowed on the deck?

A. It was lashed down.

Mr. WELLES.—We object to this question and move that the answer be stricken out, also all reference to the stowage of cargo on the ground that it is incompetent, irrelevant and immaterial, it having been shown that the libelant offered to pay all costs and expenses of shifting the same and landing libelant's cargo at Colon, and further, it is not shown how much of the cargo it would be necessary to move in order to unload the cargo of libelant.

Q. Can you tell from any data in your possession

(Deposition of Charles Kurz.)

whereabouts in the hold of the "Eureka" the shipment of the National Carbon Company was stowed?

Same objection.

A. I cannot without consulting the plan of the ship, which we do not seem to find in the office.

Q. Do you remember whether or not any considerable [159] portion of the cargo was stowed in the lower hold?

A. I don't remember definitely, but I think there was some of the shipment stowed in the lower hold.

Mr. WELLES.—I move that the answer of the witness be stricken out on the ground that it is incompetent, irrelevant and immaterial, and testifying to facts not within his knowledge.

Q. You do remember, as I understand you, that a certain proportion of the shipment of the National Carbon Company was stowed in the lower hold?

A. Yes.

Same objection and motion.

Q. Can you state from any data in your possession at this time how many barrels were so stowed?

Same objection and motion.

A. According to the stowage book which we have here there were 125 barrels stowed in the No. 1 lower hold.

Same objection and motion.

Q. Mr. Kurz, when the slide at the Canal continued after the arrival of the vessel for some little time, it is a fact, is it not, that your firm as well as the Oregon-California Shipping Co. at Portland made a thorough investigation of all possible and practicable

(Deposition of Charles Kurz.)

methods of dispatching the boat or cargo to the points of destination?

Same objection.

A. Our firm did, I don't know what the people on the Pacific Coast did.

[160] Same motion.

Q. Now, in addition to the disclosures as to those efforts made by your firm, as shown by the exhibits heretofore put in evidence, by the libelant, your firm endeavored to arrange transshipment across the canal and transportation up the west coast with other carriers, did it not? A. Yes.

Q. Among others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Steamship Company, the Panama Pacific Line at New York, the owners of the Edison Line at Boston, the Alaska Steamship Company, and Olsen & Mahoney? A. Yes.

Mr. WELLES.—Objected to, and I move that the question and answer of the witness with respect to what was done for the forwarding of cargo other than libelant's be stricken out on the ground that it is incompetent, irrelevant and immaterial under the issues in this case.

Q. And as to your efforts with all of the transportation companies named in the last question as well as those named in the various exhibits placed in evidence by the libelant, you were unable to arrange for the forwarding of the cargo by rail either across the

(Deposition of Charles Kurz.)

Isthmus or via the Tehuantepec Railroad because of the lack of carriers on the Pacific Coast to take the goods at the point of discharge **[161]** on the Pacific side?

A. That is right, up to the time I got to Portland.

Same objection.

(By Mr. WELLES.)

Q. When did you get to Portland?

A. I arrived at Portland about November 1st.

Q. You were there only four or five days before the vessel came back? A. Yes.

(By Mr. PLATT.)

Q. In addition to the efforts to arrange the transshipment of the cargo across the Isthmus and up the west coast, which proved impossible, for the reasons that you have already stated, investigation was made as to the taking of the vessel and cargo to the west coast through the Straits of Magellan, was there not? A. Yes, sir.

Same objection.

Q. And the same had to be abandoned, is it not a fact, because being an oil-burner there was no supply of fuel oil on the east or west coast of South America to make it safe for her to make the trip?

A. That is right.

Same objection.

Q. It is a fact, is it not, that the Government would not permit the unloading of vessels detained at the canal either on the west coast or the east coast unless the parties so unloading had definite arrange-

(Deposition of Charles Kurz.)

ments made and carriers ready to take the cargoes when so unloaded?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial, consisting merely of [162] hearsay. A. It is.

Q. As I understood your testimony on your direct examination, at the various interviews had with Mr. Mitchell, traffic manager of the National Carbon Company, in Philadelphia in October, 1915, with reference to the dispositon of that portion of the cargo of the steamship "Eureka" in which he was interested, it was in the nature of a discussion as to what was best to be done and what could be done and what should be done with his portion of the cargo, but that there was no demand made upon you for the delivery of this cargo at the Canal Zone?

A. Mr. Mitchell, of the National Carbon Company, came on to Philadelphia and advised me that his goods were perishable and that some arrangement had to be made immediately to get the cargo to its destination or to bring it back to Philadelphia or New York, and advised me that if we could not make such arrangements that he was ready to take delivery of his goods at Colon, pay for the expense of discharging his goods, as well as such other goods as had to be discharged to get at his goods, and pay for the reloading of the other goods on board.

Q. And subsequently the boat was sent by the Oregon-California Shipping Co. to New Orleans, and there the cargo of the National Carbon Company was unloaded?

(Deposition of Charles Kurz.)

A. I don't [163] know who the boat was sent by but she left Colon and went to New Orleans where the cargo was discharged.

Q. And that portion of the cargo which had been shipped by the National Carbon Company was turned over at New Orleans to the National Carbon Company, by Mr. Mitchell, its traffic manager, was it not? A. Yes, sir.

Q. Did you know at that time of any conditions that were made in connection with that delivery by the vessel or those in authority over it at the time and the National Carbon Company at the time of that delivery?

A. I don't know of any special arrangement that was made.

Q. Do you know whether or not, at the time of said delivery, any charges of any kind or nature were exacted by the vessel or those in authority over it as a condition precedent to the delivery to and receipt by the National Carbon Company of its portion of the shipment?

A. I don't know of any such charges.

Q. Do you know of any reason, as far as the ship was concerned, or those in authority over it at New Orleans, why there should have been any delay in the handling of the National Carbon Company shipment between New Orleans and Jersey City, from and after the time that delivery was made to the National Carbon Company by the vessel of its portion of the shipment? A. I do not.

Q. I hand you a telegram which you have hereto-

(Deposition of Charles Kurz.)

fore [164] identified, dated at Cleveland, Ohio, November 3, 1915, addressed to your firm in Philadelphia, signed by the National Carbon Company, and ask you if that telegram was received at or about the time it bears date?

A. That was received.

Claimant asks that the same be received as an exhibit on behalf of the claimant and so marked. The telegram is marked Claimant's Exhibit "A."

Q. I hand you now, Mr. Kurz, a telegram from your firm to the Oregon-California Shipping Co. under date of October 5, 1915, and ask you if that telegram was sent by you on that date?

A. It was sent.

The telegram is offered in evidence. It is marked Claimant's Exhibit "B."

Q. I now hand you what purports to be a telegram under date of October 16, 1915, addressed to your firm from the Oregon-California Shipping Co., Portland, Oregon, and ask you if that telegram was received by you? A. It was.

The telegram is offered in evidence. It is marked Claimant's Exhibit "C."

Q. I now hand you a telegram dated October 17, 1915, Portland, Oregon, addressed to your firm and signed by the Oregon-California Shipping Co., and ask you if that telegram was received by you in the course of business? A. It was.

[165] The telegram is offered in evidence. It is marked Claimant's Exhibit "D."

Q. I now hand you a telegram dated October 25,

(Deposition of Charles Kurz.)

1915, at Portland, Oregon, addressed to you individually, signed by the Oregon-Californa Shipping Co., bearing your O. K. and ask you if that telegram was received by you in due course of business?

A. It was.

The telegram is offered in evidence. It is marked Claimant's Exhibit "E."

Q. I now hand you what purports to be a telegram from your firm to Major F. C. Boggs, Chief of the Panama Canal Office at Washington, D. C., undated, and his reply to you under date of November 9, 1915, both bearing your O. K., and ask you if that is your telegram to and their reply from the Panama Canal Office at Washington, and if they were sent and received in due course of business? A. They were.

The telegrams are offered in evidence. They are marked Claimant's Exhibits "F" and "G."

(By Mr. WELLES.)

Q. What was the date of this undated one?

A. The one undated was sent about—I think it was the 8th or 9th of November.

(By Mr. PLATT.)

Q. I hand you what purports to be a copy of a cablegram [166] from Captain Bagott at Colon to you at Portland, under date of November 1, 1915, and ask you if that is a copy of a cable actually received by you from the captain? A. It is.

The cablegram is offered in evidence. It is marked Claimant's Exhibit "H."

Mr. PLATT.—I ask that counsel make the same stipulation on the copy question.

(Deposition of Charles Kurz.)

Mr. WELLES.—There is no objection to the proof of this as a genuine cable having been actually sent and received at or about the date therein stated, but same is objected to on the ground of being incompetent, irrelevant and immaterial upon the issues in this action, in view of the evidence.

Q. Your trips to Portland and to New Orleans were made for the purpose, were they not, to do everything you could to facilitate the efforts of the Oregon-California Shipping Co. to get this cargo forward to destination by some means?

A. My trip was for the purpose of getting some definite action, as the shippers were after us for information as to what was going to be done, and I didn't care whether I was helping the Oregon-California Shipping Co. or anyone else, all I was interested in was getting that cargo to its destination.

[167] Q. And your connection with the cargo, as I note from your correspondence, was that of shipping agent only? A. That is right.

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial, and I move that the answer be stricken out as a self-serving declaration, contrary to the evidence.

Q. You did not at any time claim to anyone or with anyone to be the general agent of the Oregon-California Shipping Company?

A. Well, we did advertise ourselves as general agents in the east of the Oregon-California Shipping Co.

Q. I hand you now Libelant's Exhibit 39, in which

(Deposition of Charles Kurz.)

you use the phrase "in reply we beg to refer you to our letter of December 3d, wherein we advised you that Messrs. Phelps Brothers & Co., and ourselves acted only as agents in the solicitation and providing of cargo for this steamer?"

A. That is right, that is what we did do, the general agency that I referred to meant that we had charge of the different subagents but only as to the solicitation of cargo.

Q. In other words, you at no time held yourself out, and do not now, to have ever been the general agents in the broad general sense of a complete agency for all matters of every kind and nature of the Oregon-California Shipping [168] Co?

A. We were only the general agents in so far as picking up freight was concerned; booking freight.

Mr. WELLES.—I object and move to strike out the question and the answer on the ground that they are incompetent, irrelevant and immaterial and a mere conclusion of the witness.

Q. You sent various cables to the captain at Colon which are included in the exhibits which have been introduced in your testimony by the libelant, and various telegrams and other communications to other parties, in which you issued certain directions and made certain representations of matters of fact; I ask you whether you had any authority from the Oregon-California Shipping Co. to make any such representations of fact or to issue any orders to the captain of the vessel?

A. I had authority that I got out at Portland.

(Deposition of Charles Kurz.)

Mr. WELLES.—Libelant objects and moves to strike out the question and the answer on the ground that they are incompetent, irrelevant and immaterial, and a mere conclusion, and that the letters, messages and other documents in evidence speak for themselves.

Q. Prior to your going to Portland?

A. I had no authority other than as booking agent, and whatever I did was done to bring about some definite action.

[169] Q. Any letters, telegrams or directions which you may have issued, or statements of fact, after you went to Portland,—from whom did you receive any authority to make such representations of fact or to issue such instructions?

A. Mr. Williams.

Same objection and motion.

Q. Did the Board of Directors of the Oregon-California Shipping Company ever authorize you with reference to their property rights to make any representations of matters of fact or to issue any instructions about property which was in their control or concerning the steamship "Eureka" which they had under charter?

A. Not that I know of; my name was only signed to those cables because I started to cable the captain. He knew my name; I don't know whether he would know Mr. Williams' name.

Redirect Examination by Mr. WELLES.

Q. When did you first learn that fuel oil could not be obtained to go around by way of Magellan?

(Deposition of Charles Kurz.)

A. I think it was about ten days after the ship arrived at Colon.

Q. Prior to the telegram that has been put in evidence by the claimant? A. Yes, sir.

Q. Was any cargo at all unloaded at Colon?

A. No.

Q. The whole cargo was brought back to New Orleans, is that right? A. Yes, sir.

Q. At New Orleans do you recall a demand made by Mr. **[170]** Mitchell in writing upon Mr. Williams?

Mr. PLATT.—Objected to on the ground that the same is incompetent, irrelevant and immaterial because under the testimony as heretofore introduced the deterioration in the value of the subject of the shipment by the libelant upon the SS. "Eureka" was due to causes specifically excepted in the bill of lading under which the goods were shipped, to wit, deterioration arising from heat and confinement in the hold of the vessel, both in and of themselves, and as connected with the prolongation of the voyage, which was likewise within the exceptions of the terms of the bill of lading, and due likewise to the deterioration in value or deterioration in quality, or both, due to the inherent character of the commodity under carriage, from any liability for which the carrier was expressly excepted by Clauses 1, 2, 3 and 8 of the bill of lading, Libelant's Exhibits 1, 3 and 5, the benefit of each and all of which provisions is expressly claimed by the vessel and the claimant, as well as all other provisions of the bill of lading,

(Deposition of Charles Kurz.)

whether specifically enumerated or not, and for each and all of these reasons the question and the answer thereto are each incompetent, irrelevant and immaterial; which objection the claimant at **[171]** this time makes to each and all of the inquiries relating to damage to the cargo, deterioration in quality, depreciation in value, or any other shrinkage or loss in market value of every kind and nature, without renewing this objection to each and every succeeding inquiry of the same character, and in addition thereto, the carrier and the claimant places the same objection in the record as a motion to strike out as incompetent, irrelevant and immaterial each and every answer relating to proof of damage on the same grounds and for the same reasons, where the form of the question does not indicate in advance that the question of damage is the question under consideration, and makes this motion as a continuing motion to each and all answers relating to the question of damage, without the necessity of renewing the said motion to each and all answers wherein the subject matter of the answer is in whole or in part the question of damage, depreciation, deterioration, shrinkage or loss of market or other value. Also as incompetent unless the witness saw the writing.

Mr. WELLES.—Same exception as heretofore.

A. I don't recall a demand, but I recall that Mr. Mitchell served Mr. Williams with a letter.

[172] Q. Had the cargo been delivered to Mr. Mitchell at that time? A. No.

(Deposition of Charles Kurz.)

Q. Did you see Mr. Mitchell serve Mr. Williams with this letter? A. I did.

Q. Had Mr. Mitchell told you previously that he was going to serve a written demand on Mr. Williams?

A. Mr. Mitchell told me that he would of course have to consult an attorney at New Orleans and take such action as would protect the interests of the National Carbon Company, and that he would be serving Mr. Williams with either a libel or a letter, whereupon, or shortly thereafter, Mr. Mitchell handed Mr. Williams a letter.

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, because what Mr. Mitchell meant or told the witness would not bind the carrier or the vessel, as the witness has already testified that he was not the agent of the vessel or carrier, but only special agent for the solicitation of freight and shipping of cargo.

Same exception.

Mr. PLATT.—I move to strike out the answer on the same grounds as the objection, and also on the further ground that it has not been shown that the letter contained anything more than expressions of felicity.

[173] Same exception.

Q. Do you recall that Mr. Mitchell, in talking with you on the two trips he made to Philadelphia to see you, offered to go down to the Canal Zone himself and look after the cargo at Colon if you would unload it there for him?

(Deposition of Charles Kurz.)

Same continuing objection. Same exception.

A. He did.

[174] To the offer in evidence of cablegram dated Philadelphia, October 4, 1915, addressed to Captain Bagott, steamer "Eureka," Colon, Panama, signed Rubelli, claimant, makes no objection.

The cablegram is marked Libelant's Exhibit 42.

Mr. PLATT.—As to the cablegram addressed to Rubells, Phila., the first word of which is "ALYL-WEIGHT," signed by Bagott, captain of the ship, with translation attached, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 43 and the translation thereof Libelant's Exhibit 43–A.

Mr. PLATT.—To the offer in evidence of the cablegram dated Portland, Oregon, October 4, 1915, addressed to L. Rubelli's Sons, Philadelphia, signed by the Oregon-California Shipping Company, claimant objects to the same as incompetent, irrelevant and **[175]** immaterial, as not within any of the issues presented by the pleadings.

Mr. WELLES.—Exception, among other reasons, on the ground that this is pertinent as an admission by the carrier.

The telegram is marked Libelant's Exhibit 44.

Mr. PLATT.—As to the telegram dated Philadelphia, October 5, 1915, signed by L. Rubelli's Sons, and addressed to the Panama Railroad Company, claimant makes no objection.

The telegram is marked Libelant's Exhibit 45.

Mr. PLATT.—As to the offer of the telegram

(Deposition of Charles Kurz.)

dated New York, October 6, 1915, sent to Rubelli's Sons, Philadelphia, signed Panama Railroad, claimant makes no objection.

The telegram is marked Libelant's Exhibit 46.

Mr. PLATT.—As to the libelant's offer of the telegram dated October 5, 1915, addressed to Rubelli's Sons, Philadelphia, and signed by the Oregon-California Shipping Company, the claimant makes the objection that the same is immaterial and irrelevant as not within any of the issues in this case, and claimant also claims the benefit of all the continuing objections heretofore interposed upon the prior offers.

[176] Mr. WELLES.—Libelant submits that this telegram is admissible as an admission of the carrier and as part of the *res gestae*.

The telegram is marked Libelant's Exhibit 47.

Mr. PLATT.—To the offer of the letter from the Quaker Line, dated October 8, 1915, addressed to the Honorable Woodrow Wilson, President, United States of America, Washington, D. C., the claimant objects on the ground that the same is incompetent, irrelevant and immaterial, in that it is not a communication by any person, firm or corporation at any time authorized, by agency or otherwise, to make any representations on behalf of the SS. "Eureka," its then owners or subsequent owners, its charterers or navigators, and that libelant is bound, furthermore, by having placed in evidence Libelant's Exhibits 33, 39 and 40, wherein any authority of the signer of this letter is expressly disclaimed by

(Deposition of Charles Kurz.)

L. Rubelli's Sons and Charles Kurz, General Manager, doing business as the Quaker Line, or any of its agents, to act for the Oregon-California Shipping Company or the steamship "Eureka" other than as soliciting agents and for the providing of cargo, and claimant further objects to the admission of this letter on all of the continuing objections heretofore [177] placed in the record.

Libelant makes continuing exception as heretofore to all objections as to exhibits.

The letter is marked Libelant's Exhibit 48.

Mr. PLATT.—To the libelant's offer in evidence of cable dated Colon, October 9, 1915, addressed to Rubelli, Philadelphia, signed by Baggott, captain of the ship, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 49.

Mr. PLATT.—As to libelant's offer in evidence of the telegram dated Philadelphia, October 9, 1915, addressed to the Oregon-California Shipping Co., Portland, Oregon, signed L. Rubelli's Sons, claimant makes its continuing objections as heretofore placed in the record.

The telegram is marked Libelant's Exhibit 50.

Mr. PLATT.—As to the letter of October 9, 1915, addressed to the Oregon-California Shipping Co., Portland, Oregon, signed L. Rubelli's Sons, claimant makes its continuing objection as heretofore interposed in the record.

The letter is marked Libelant's Exhibit 51.

Mr. PLATT.—As to the cablegram dated October 11, 1916, addressed to Captain Baggott, steamer "Eu-

(Deposition of Charles Kurz.)

reka," Colon, sent by L. Rubelli's Sons, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 52.

[178]. Mr. PLATT.—As to libelant's offer of the cablegram dated October 11, 1915, from Colon, addressed to Rubelli, Philadelphia, and signed by Captain Bagott, captain of the ship, libelant makes no objection.

The cablegram is marked Libelant's Exhibit 53.

Mr. PLATT.—As to the offer by libelant of cablegram dated Colon, October 11, 1915, addressed to Rubelli's Sons, Philadelphia, signed Baggott, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 54.

Mr. PLATT.—As to the offer by libelant of telegram dated Philadelphia, October 11, 1915, addressed to the Chief of Office, Panama Canal, Washington, D. C., signed L. Rubelli's Sons, claimant makes its continuing objection.

The letter is marked Libelant's Exhibit 55.

Mr. PLATT.—As to the offer of the libelant of telegram dated October 12, 1915, addressed to L. Rubelli's Sons, Philadelphia, signed by the Panama Canal Office, Washington, claimant makes its continuing objection.

The telegram is marked Libelant's Exhibit 56.

Mr. PLATT.—As to the offer made by libelant of letter dated Washington, D. C., October 11, 1915, [179] addressed to L. Rubelli's Sons, Philadelphia, Pa., and signed F. O. Boggs, Major, Corps of Engineers, U. S. A., Chief of Office, with circular memo-

(Deposition of Charles Kurz.)

randum of October 8th, 1915, signed by the same party attached, claimant makes no objection.

The letter is marked Libelant's Exhibit 57, and the circular attached is marked Libelant's Exhibit 57–A.

Mr. PLATT.—As to the offer in evidence by the libelant of the telegram dated Portland, Oregon, October 11, 1915, signed by the Oregon-California Shipping Co., and addressed to L. Rubelli's Sons, at Philadelphia, claimant makes its same continuing objection, and further, that the same is incompetent, irrelevant and immaterial as not within any of the issues in this case.

Mr. WELLES.—Libelant submits that this telegram is admissible as an admission of the carrier, and as part of the *res gestae.*

The telegram is marked Libelant's Exhibit 58.

Mr. PLATT.—As to the offer by libelant of day-letter dated Philadelphia, October 12, 1915, addressed Oregon-California Shipping Co., Portland, Oregon, and signed L. Rubelli's Sons, claimant, makes its continuing objection.

[180] The telegram is marked Libelant's Exhibit 59.

Mr. PLATT.—As to the offer by libelant of letter dated October 13, 1915, signed by L. Rubelli's Sons and addressed to Oregon-California Shipping Co., Portland, Oregon, claimant makes its continuing objection.

The letter is marked Libelant's Exhibit 60.

Mr. PLATT.—As to the night-letter of October

(Deposition of Charles Kurz.)

14, 1915, offered by libelant, signed by Rubelli's Sons, Philadelphia, and addressed to the Oregon-California Shipping Co., Portland, Oregon, claimant makes its continuing objection.

The night-letter is marked Libelant's Exhibit 61.

Mr. PLATT.—As to the offer by libelant of a letter dated Washington, D. C., October 14, 1915, addressed to L. Rubelli's Sons, signed by F. G .Boggs, Major, Corps of Engineers, U. S. A., Chief of Office, and attached thereto copy of Libelant's Exhibit 57–A, circular of the Panama Canal authorities of October 12, 1915, and circular of Panama Canal Office dated October 13, 1915, claimant makes no objection.

The letter and circulars attached are marked Libelant's Exhibits 62–A, 62–B, and 62–C respectively.

Mr. PLATT.—As to the offer by the libelant [181] of cablegram dated October 15, 1915, from Colon, signed by Baggott, captain of the ship, addressed to Rubelli at Philadelphia, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 63.

Mr. PLATT.—As to libelant's offer of the day-letter of date October 15, 1915, signed by L. Rubelli's Sons at Philadelphia, addressed to Oregon-California Shipping Co., Portland, Oregon, claimant makes its continuing objection.

The day-letter is marked Libelant's Exhibit 64.

Mr. PLATT.—As to the offer by libelant of telegram dated Philadelphia, Pa., October 16, 1915, signed Rubelli's Sons, addressed to the Oregon-California Shipping Co., Portland, Oregon, claimant

(Deposition of Charles Kurz.)

makes its continuing objection, and also the further objection that it is incompetent, irrelevant and immaterial, in that it is an attempt to pass upon a proposition of law.

Mr. WELLES.—Libelant submits that this telegram is competent as an admission and as part of the *res gestae,* and libelant makes this as a continuing statement as to all objections to the exhibits.

The telegram is marked Libelant's Exhibit 65.

[182] Mr. PLATT.—As to the offer of libelant of telegram dated October 18, 1915, signed L. Rubelli's Sons, addressed to the Oregon-California Shipping Co., Portland, Oregon, claimant objects that it is incompetent, irrelevant and immaterial for the reasons stated on pages 18, 19 and 20, of the record, also on pages 24 and 25 of the record, also on pages 44 and 45 of the record, and for the reasons stated in all the other continuing objections.

The telegram is marked Libelant's Exhibit 66.

Mr. PLATT.—As to the further offer at this time by the libelant of the telegram dated October 19, 1915, signed L. Rubelli's Sons, addressed to the Oregon-California Shipping Company, Portland, Oregon, heretofore marked Libelant's Exhibit 13, as identified by the witness Kurz, claimant makes its continuing objections, and that the same is incompetent to bind the vessel on the ground that the terms of carriage were defined by the bill of lading, and that the consignor of a portion of the shipment has no legal right, under the bill of lading, to require the ship to discharge the cargo or a portion of it at a

(Deposition of Charles Kurz.)

point designated by him, but that the carrier's obligations, as well as its rights, to the disposition of the goods under the [183] circumstances as developed at the Panama Canal are defined by the bill of lading, and that under the evidence as introduced up to this time, the ship performed its legal obligations under the bill of lading, and on the further ground that the instrument offered in evidence is immaterial because it has been heretofore testified to by the witness Mitchell, on behalf of the libelant, that libelant accepted delivery of the goods at the port of New Orleans, and any negotiations or exchange of letters or telegrams or oral representations of negotiations as to discharge at some other port are incompetent, irrelevant and immaterial.

Mr. WELLES.—Libelant moves to strike out this objection as incompetent, irrelevant and immaterial, not based on facts in evidence, and upon the further ground that the testimony speaks for itself, and on the additional ground that the charterers of the vessel or their agents or servants are not entitled to rely on the provisions of the bill of lading in view of the facts proved in this case.

Mr. PLATT.—As to the offer by libelant of the circular dated Philadelphia, October 22, [184] 1915, signed by L. Rubelli's Sons, the claimant makes all of the continuing objections heretofore interposed, and also the further objection that it is incompetent to bind the owners of the ship, past or present, the ship, its charterers or any of them, by reason of the fact that heretofore the libelant has introduced

(Deposition of Charles Kurz.)

in evidence Libelant's Exhibits 33, 39 and 40, to the effect that L. Rubelli's Sons were only agents for the solicitation and providing of cargo, and were not the general agents of the ship or its owners or charterers, hence the statements contained in the document now under offer are incompetent to bind the said ship, owners and charterers, and the statements therein contained are incompetent, irrelevant and immaterial for all of said reasons.

Mr. WELLES.—Libelant submits that this statement is competent as an admission by the agents of the charterers and of the vessel and as part of the *res gestae,* and libelant wishes to state at this time that Libelant's Exhibits 33, 39 and 40, referred to by counsel for claimant, were offered, not as defining the extent of the agents' authority, which is evidently a self-serving [185] declaration, by which libelant is not bound, but were offered among other reasons as part of the *res gestae* and as an admission that the agents of the vessel had notice of libelant's claim.

The circular is marked Libelant's Exhibit 67.

Mr. PLATT.—As to the offer by libelant of the telegram dated Philadelphia, October 23, 1915, addressed to the Oregon-California Shipping Co., at Portland, Oregon, and signed by Rubelli's Sons, claimant makes its continuing objection.

The telegram is marked Libelant's Exhibit 68.

Mr. PLATT.—As to the offer by libelant of the telegram dated Portland, Oregon, October 22, 1915, signed by Oregon-California Shipping Co. and ad-

(Deposition of Charles Kurz.)

dressed to L. Rubelli's Sons, Philadelphia, claimant makes no objection.

The telegram is marked Libelant's Exhibit 69.

Mr. PLATT.—As to the offer of letter from the National Carbon Company, signed by Anson J. Mitchell, Traffic Manager, addressed to L. Rubelli's Sons, dated October 25, 1915, claimant makes no objection.

The letter is marked Libelant's Exhibit 70.

At this point the original of Libelant's Exhibit 21 is reoffered as identified by the witness [186] Kurz.

Mr. PLATT.—Continuing objection and objection made at the time of the original offer.

As to the offer by libelant of cablegram dated Portland, Oregon, October 29, 1915, addressed to Bagott, master of the steamship "Eureka," at Colon, signed by Charles Kurz, claimant makes all of its continuing objections heretofore interposed, and in addition objects that the cablegram is incompetent, irrelevant and immaterial in that the witness Kurz has already testified that the attempted transportation of the cargo of the S. S. "Eureka," as therein discussed, became impossible because ships were not obtainable on the west coast for carriage from Colon or Salinas Cruz, the terminii respectively of the Panama Railroad and the Tehuantepec Railroad.

Mr. WELLES.—Libelant submits that this cablegram is admissible as a part of the *res gestae.*

The cablegram is marked Libelant's Exhibit 71.

Mr. PLATT.—As to the cablegram dated Port-

(Deposition of Charles Kurz.)

land, Oregon, November 3, 1915, addressed to Bagott, master of the S. S. "Eureka," at Colon, signed by Kurz, claimant interposes each and all of the continuing objections.

The cablegram is marked Libelant's Exhibit 72.

[187] Mr. PLATT.—As to the offer by libelant of the cablegram dated November 4, 1915, at Colon, signed by Captain Bagott, and addressed to Kurz, Portland, Oregon, claimant interposes each and all of the continuing objections.

The cablegram is marked Libelant's Exhibit 73.

Mr. PLATT.—As to the offer by libelant of cablegram dated Portland, Oregon, November 4, 1915, addressed to Captain Bagott, at Colon, and signed Kurz, with translation below, claimant again interposes each and all of the continuing objections.

The cablegram is marked Libelant's Exhibit 74.

Mr. PLATT.—As to the cablegram addressed to Kurz at Portland, Oregon, and signed by Captain Bagott, with translation attached, bearing date November 5, 1915, claimant interposes each and all of its continuing objections.

The cablegram is marked Libelant's Exhibit 75 and the translation thereof Libelant's Exhibit 75–A.

Mr. PLATT.—As to the offer by libelant of cablegram dated Colon, November 5, 1915, addressed to Kurz, Portland, and signed Bagott, [188] claimant interposes each and all of its continuing objections.

The cablegram is marked Libelant's Exhibit 76 and the translation thereof Libelant's Exhibit 76–A.

(Deposition of Charles Kurz.)

Mr. PLATT.—As to the offer by libelant of telegram or night-letter dated November 9, 1915, addressed to Captain Bagott, master of S. S. "Eureka," at New Orleans, La., signed Chas. Kurz, claimant interposes each and all of its continuing objections.

The night-letter is marked Libelant's Exhibit 77.

Mr. PLATT.—As to the offer by libelant of the letter of December 2, 1915, addressed to L. Rubelli's Sons at Philadelphia, and signed by Phelps Brothers, and attached thereto what purports to be a copy of a letter from the National Carbon Copy, dated December 1, 1915, addressed to Phelps Brothers, New York City, and L. Rubelli's Sons at Philadelphia, claimant makes each and all of the continuing objections heretofore placed in the record, and in addition thereto, objects on the ground that the letters offered are incompetent, irrelevant and immaterial because heretofore, by [189] Libelant's Exhibits 33, 39 and 40, libelant placed in evidence proof that Messrs. Phelps Brothers & Company and Messrs. L. Rubelli's Sons were not general agents for the steamship "Eureka," her owners, past or present, or her charterers, but were only agents for the solicitation and providing of cargo, and furthermore, the witness Charles Kurz has himself testified that at no time were L. Rubelli's Sons or Phelps Brothers & Company and Charles Kurz or any or all of them general agents of the S. S. "Eureka," her owners, past or present, or her charterers or any of them, but were only agents as defined in the said Libelant's Exhibits 33, 39 and 40, and consequently the letters now offered in evidence

(Deposition of Charles Kurz.)

and all other letters of a similar character by which libelant is attempting to charge that L. Rubelli's Sons, Phelps Brothers & Company, and Charles Kurz, or each or any of them, were general agents of the steamship "Eureka," her owners, past or present, or her charterers, or any of them, are each and all of them incompetent irrelevant and immaterial, which objection is hereby made a continuing one as to all of the offers heretofore or which may hereafter be made, or any of them; and claimant further objects to the admission of the letters in evidence **[190]** as incompetent, irrelevant and immaterial on the ground that it is not a claim within the provisions of Clause 6 of the bill of lading, nor, if it should be a claim, is it presented within the time therein named.

Mr. WELLES.—Libelant submits that this letter is admissible for the reasons already stated, and also submits that libelant is not bound by the statements of the witness and the exhibits referred to in view of this witness' other testimony.

The letters referred to are marked Libelant's Exhibits 78 and 78–A respectively.

Mr. PLATT.—As to the offer now made by Libelant of the letter of December 7th, 1915, addressed to L. Rubelli's Sons, Philadelphia, signed by Phelps Brothers & Company, claimant makes the same objection as to the last preceding offer.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 79.

Mr. PLATT.—As to libelant's offer in evidence of

(Deposition of Charles Kurz.)

a letter dated December 8, 1915, addressed to Mr. A. J. Mitchell, Traffic Manager, National Carbon Company, Cleveland, Ohio, signed L. Rubelli's [191] Sons, claimant makes the same objection as to the last two preceding offers.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 80.

Mr. PLATT.—As to the offer by libelant of letter dated January 13, 1916, addressed to the Oregon-California Shipping Co., Portland, Oregon, signed blank, liquidator claimant makes the same objection as to the last three preceding offers.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 81.

Mr. PLATT.—As to the offer by libelant of letter dated January 13, 1916, addressed to Messrs. Phelps Brothers, New York, and signed in the same manner, by the liquidator, claimant makes the same objection as to the last four preceding offers.

Libelant makes the same statement.

The letter is marked Libelant's Exhibit 82.

Mr. PLATT.—As to libelant's offer in evidence of letter dated January 13 1916, addressed to A. J. Mitchell, Traffic Manager, National Carbon Company, signed liquidator, claimant makes the same objection [192] as to the last five preceding offers.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 83.

(Deposition of Charles Kurz.)

Mr. PLATT.—Claimant offers in evidence the following telegrams and letters identified by the witness Kurz:

Day-letter dated Philadelphia, October 11, 1915, addressed to the Oregon-California Shipping Co., and signed by L. Rubelli's Sons;

Letter dated October 11, 1915, addressed to Oregon-California Shipping Co., and signed L. Rubelli's Sons;

Letter dated October 16, 1915, addressed to L. Rubelli's Sons, and signed Oregon-California Shipping Co., Inc.;

Day-letter dated October 18, 1915, addressed to Oregon-California Shipping Co., and signed L. Rubelli's Sons;

Letter dated October 25, 1915, addressed to L. Rubelli's Sons, Philadelphia, and signed National Carbon Company, Anson J. Mitchell, Traffic Manager.

Mr. WELLES.—There is no objection as to proof of the sending and receiving of the day-letters [193] and letters, but libelant reserves all rights to object upon the ground of competency, materiality and relevancy to the issues of this action.

The papers referred to are marked consecutively Claimant's Exhibits "I," "J," "K," "L," and "M."

[194] NATIONAL CARBON COMPANY

v.

S. S. "EUREKA."

64 Wall Street, New York, December 20, 1915, 10.30 A. M.

Met pursuant to adjournment.

Present as before.

Deposition of Anson J. Mitchell, for Libelant.

Direct Examination of ANSON J. MITCHELL (Continued).

(By Mr. WELLES.)

Q. Mr. Mitchell, did you subsequently send the same number of dry cells to the points of destination of these original shipments in order to replace the original shipments which were not delivered?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, and not a proper element of damage, and on the further ground that the libelant having received and the carrier delivered the subject matter of the shipment of the libelant at the port of New Orleans without objection or qualification, all expenses incurred by the libelant in and about the handling of the shipment after being so delivered and received are incompetent, irrelevant and immaterial; on [195] the further ground that under the terms of the bill of lading, the carrier, under the circumstances which have been heretofore recited and testified to by the witness, was authorized and entitled to deliver the goods which were the subject matter of the libelant's shipment to the libelant at

(Deposition of Anson J. Mitchell.)

New Orleans, whether the libelant accepted the same voluntarily or otherwise, and that any expenses incurred by the libelant in and about the shipment so delivered are not proper elements of damage, and any testimony with relation to the same is incompetent, irrelevant and immaterial, and on the further ground that no claim having been presented within ten days from the date of the said delivery and acceptance, any testimony as to the said claim is incompetent, irrelevant and immaterial. This objection, is made as a continuing objection to all interrogatories calling for testimony of this character, and where the libelant's interrogatories do not disclose the nature of the answer to be expected, is made as a continuing motion to strike out from the record the same on the same grounds and for the same reasons as the objection to the admission of the testimony.

Mr. WELLES.—It is understood that every [196] objection interposed by counsel for claimant is excepted to and is a continuing one, whether so stated or not, to each and all of the objections interposed. A. Yes.

Q. Was it necessary to do this?

Same objection and exception.

A. It was.

Q. Did you send them as soon as they could be gotten out from your Cleveland plant?

Same objection and exception.

A. Yes, sir.

Q. Did you realize as good a price for those cells

(Deposition of Anson J. Mitchell.)

as you would have realized from the original cells?

Mr. PLATT.—Same objection, and the added objection that prospective profits are not a proper element of damage.

Same exception.

A. No, sir, we did not.

Q. What did you realize?

Same objection and exception.

A. Two cents per cell less.

Q. What did this two cents per cell less amount to?

Same objection and exception.

A. There were 45775 cells at two cents per cell, which would be $915.50.

[197] Q. What was the amount of freight charges that you paid on these replacement cells to California from Cleveland?

Same objection and exception.

A. $1,312.66.

Q. Was this greater or less than the original freight that you paid the "Eureka"? A. Greater.

Q. How much greater?

Same objection and exception.

A. The "Eureka" price was 50 cents per 100 pounds, while the price we had to pay on replacing was $1.25 per hundred weight.

Q. What did that amount to on this shipment?

Same objection and exception.

A. The increase on the shipment amounted to $787.60.

Q. What were the items of expense at New Or-

(Deposition of Anson J. Mitchell.)

leans totaling the $261.81 to which you have already testified?

Same continuing objection and on the further ground that it is incompetent, irrelevant and immaterial as not being a proper element of damage.

Same exception.

A. Transportation charges of $88.25.

Q. You mean by that your fare?

A. Fare down and back and sleeper and incidentals.

Q. What other charges?

[198] Same objection and exception.

A. The expenses and incidentals to repacking and recoopering and expenses like that, which had to be done at New Orleans, $57.86, hotel and meals $100.05, sundries such as tips and things that are absolutely necessary on trips like that, $15.65.

Q. Does that total $261.81? A. It does.

Q. Were these all necessary expenses to your trip down there?

Mr. PLATT.—Continuing objection, and on the same grounds heretofore stated, that it is not a proper element of damage.

A. I might say this, that in checking up this expense account the other day, I found I had charged one day's expenses which really should not have gone in, because it was necessary on coming back for me to stop off at Washington to see a man on another matter, and I included this in my expense account. I did not notice it till I checked it up the other day, because it all goes in to my company as expense

(Deposition of Anson J. Mitchell.)

account at one time, so you might say $15 in there really should not be included in that, that is included in the whole thing, you might say, so you can deduct $15 from that and I think it would be a fair expense account.

Q. And the other items aside from that $15 were all [199] necessary to the trip?

A. All necessary on account of that.

Q. Did you go down to New Orleans for any other business besides this?

Same objection and exception.

A. No, sir.

Q. The sole business, then, transacted on this trip was in connection with the "Eureka" shipment and the side trip to Washington of $15 that you mentioned?

Same objection and exception.

A. Yes.

Q. If you had not made this trip to New Orleans would you have made the side trip?

Same objection and exception.

A. Not at the time, no, I would have waited until I had other matters to handle at Washington.

Q. What do these items of freight charges and depreciation of market value added to the total of $4,037.58 previously testified to amount to?

Mr. PLATT.—Claimant objects to the testimony sought to be elicited on the ground that the same is incompetent, irrelevant and immaterial, in that the bill of lading required the libelant to present a claim in writing to the shipper within 10 days of the date

(Deposition of Anson J. Mitchell.)

of delivery to it, and that if such [200] claim has been presented in writing it is the best evidence, and oral testimony is incompetent to vary the terms thereof, or change the amount or modify the items. I also make the continuing objection.

Mr. WELLES.—Exception, as the bill of lading speaks for itself.

A. $6,250.74, with a credit of $531.97 for 15 barrels short shipped which did not go forward on the "Eureka," making a total of $5,718.77.

The WITNESS.—I wish to refer to page 93 of the record and correct a statement there as to insurance charges, as no insurance charges were paid on the replacement shipment from Cleveland to California.

Q. Mr. Mitchell, I show you this statement consisting of eight pages, totalling $5,718.77 and ask you if that is a correct statement of the items of damage of the National Carbon Company against the steamship "Eureka"? A. It is.

The statement is offered in evidence. It is marked Libelant's Exhibit 84A to 84H.

(By Mr. PLATT.)

Q. When was this instrument which is now offered in evidence prepared?

A. Pages 2, 3, 4, 5, 6, 7 and 8 were prepared prior to September and rendered on September 6, 1916.

[201] Q. To whom were they sent?

A. They were sent to Harrington, Bigham & Englar, our attorneys.

Q. Was this instrument now offered in evidence

(Deposition of Anson J. Mitchell.)

or any duplicate thereof sent to the Oregon-California Shipping Co., or to anyone other than Harrington, Bigham & Englar by the libelant? A. No.

Q. The remaining sheet of the eight numbered one, is merely a compilation that you have made during this hearing, as I understand it?

A. I did not prepare that at the time, because I had not had a chance to see our attorneys as to whether or not I had a right to do so.

Mr. PLATT.—The instrument offered in evidence is objected to in addition to the continuing objections heretofore interposed on the ground that the same is merely a compilation of the witness' theory of the amount that the libelant is entitled to recover, and is not competent for that purpose? It is not a document which has ever been presented to the carrier or claimant under the bill of lading, the ship or any one at any time connected therewith, and no theory of evidence would be admissible, it is wholly incompetent, irrelevant and immaterial.

Mr. WELLES.—Excepted to as incompetent, irrelevant and immaterial, consisting of conclusions, and upon the additional ground that it has already [202] been shown that written demand for damage has been duly made by the carrier.

Same exception.

(By Mr. WELLES.)

Q. Do all the items on this statement represent loss or expenditures made by the National Carbon Company in connection with these shipments on the S. S. "Eureka," involved in this case?

(Deposition of Anson J. Mitchell.)

Same objection and exception.

A. They do.

Q. Were you authorized by the National Carbon Company to prepare this statement?

Same objection and exception.

A. Yes.

Q. Do you know from your own knowledge that the items therein stated are correct?

Same objection and exception.

A. I do.

Q. Do you recall when you were in New Orleans you delivered to Mr. Williams a certain paper or writing in the presenec of Mr. Kurz, to which Mr. Kurz has referred in his testimony? A. I do.

Q. Have you the original or a copy of that paper?

A. I have not.

Mr. WELLES.—I call for the original of that [203] paper or writing.

Mr. PLATT.—The claimant, in answer to that demand, replies that the alleged document is not within its possession or that of any of its attorneys or agents; that it never heard of the same until the hearing in Philadelphia yesterday, and that it has no means of obtaining the same which is not open to libelant; that there has been no showing of diligence on the part of the libelant to obtain the same, and that the demand comes too late.

Mr. WELLES.—Excepted to among other reasons because it is shown that the writing or paper was delivered to an agent of the steamship "Eureka."

Q. Did you keep any copy of that writing or

(Deposition of Anson J. Mitchell.)

paper? A. I believe I did, yes, I know I did.

Q. Have you tried to find and bring with you that copy?

A. I have searched all through my files and cannot find it.

Q. What was contained in that paper or writing?

Mr. PLATT.—In addition to the continuing objection heretofore interposed, claimant objects on the ground that the testimony of the witness on this subject is incompetent, irrelevant and immaterial, and on the further ground that the oral testimony of the witness on the showing made [204] is incompetent because it would not be the best evidence, and no diligence has been shown on the part of the libelant to obtain the original; and that in the absence of such a showing of diligence and inability, after due diligence, to obtain the same, secondary evidence of the contents of the writing is entirely incompetent.

Same exception.

A. After reaching New Orleans, not being perfectly clear as to my legal rights, I talked the matter over with the attorney for the Southern Pacific Railroad Company, and he advised—

Mr. PLATT.—Objected to on the ground that the answer now sought to be elicited is purely hearsay, not within the scope of the question.

Q. What was contained in that letter?

Same objections.

Same exception.

A. The demand for the goods.

Q. What were the exact words of that letter, as

(Deposition of Anson J. Mitchell.)

well as you can recall them at present?

A. I can tell you the gist, but I cannot tell exactly.

Q. State as closely as you can?

Same objections and exception.

A. I made a demand for the goods.

[205] Q. The letter demanded the goods?

Same objections and exception.

O. The letter contained a demand for the goods and a notice that we would make claim for damage, and the amount of the claim or damage could not be ascertained until after the goods had been returned to the factory for fixing up or reconditioning.

Q. Do you recall the exact wording of the letter or writing?

Same objections and exception. A. I do not.

Q. Who is this Mr. Williams?

A. He was the manager of the Oregon-California Shipping Co.

Q. Where was his office? A. At that time?

Q. Yes.

A. St. Charles Hotel was where his office was at that time, New Orleans, at that time, but I gave him the letter in the office of the Santa Fe Railroad Company which is also in the St. Charles Hotel at New Orleans.

Q. Do you know what Mr. Williams' present address is? A. I do not.

Q. Has he an office in New York?

A. I don't know.

Q. Have you had any information as to where his present office is?

(Deposition of Anson J. Mitchell.)

A. I was advised by Mr. Kurz of the Philadelphia Shipping Company yesterday while in his office that Mr. Williams was at present employed by them in New [206] York City.

Q. When was this letter or writing delivered to Mr. Williams in New Orleans?

A. On November 19th.

Q. 1915? A. 1915.

Mr. WELLES.—You may cross-examine.

Cross-examination by Mr. PLATT.

Q. If you had been interested, Mr. Mitchell, in obtaining Mr. Williams' address in New York, you could have asked the same of Mr. Kurz, could you not, at that time?

A. I thought you knew his address and that we would see him here either this day or the following day.

Q. You don't mean to imply, do you, by your answers to the questions that have been put to you with reference to Mr. Williams' whereabouts in New York that you cannot ascertain it if you desire?

A. No—

Q. When you first negotiated with the Oregon-California Shipping Company to transport dry cells from the ports of New York and Philadelphia to the ports of San Pedro, San Francisco and Portland on the west coast, did you make any investigation as to the character of the construction of the carriers by which those dry cells were to be transported?

A. Yes, I did, I was in New York shortly before.

(Deposition of Anson J. Mitchell.)

I offered these batteries, or got a price from Rubelli's Sons—negotiating with the American-Hawaiian Line and the Luckenbach people, trying to get them to [207] reduce the rate on dry cells from New York to the ports mentioned. I did not induce them, but was told by the railroad people that perhaps I could get a better rate from the Oregon-California Shipping Company and also the Panama Pacific Line. I then got in touch with those people, and they told me about the conditions of the "Eureka" and the "Tampico," also the "Kroonland" and the "Finland," and I think there was one other, the Grace Line, W. R. Grace & Company's Line and other steamers.

Q. How much better rate per 100 pounds could you get on the "Eureka" than your investigation showed you you could have obtained from the other lines mentioned?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial upon the issues in this action, and I move that the question and answer be stricken out, and also all testimony as to negotiations with other carriers.

A. I think it was 30 cents per hundred weight.

Q. The rate you paid on the "Eureka" was 50 cents a hundred weight? A. Yes.

Q. And the best you were able to obtain on other ships was 80 cents? A. At that time.

Q. What investigation, if any, did you make as to the nature of the ships that were operated by the

(Deposition of Anson J. Mitchell.)

Oregon-California Shipping Co.?

[208] Same objection.

A. I asked that question and they told me practically the same as the Emory Steamship Company, with whom we already had made quite a number of shipments.

Q. Did you know that they were lumber carriers, bringing lumber from the west coast to the east coast, and taking back miscellaneous cargo from the east coast to the west coast?

Same objection.

A. I don't believe I did at that time.

Q. Did you make any inquiry as to whether they were steel or wooden ships? A. No.

Same objection.

Q. Did you make any inquiry as to whether or not they were ventilated or unventilated boats?

A. No.

Same objection.

Q. I hand you Libelant's Exhibit 17, being a telegram dated October 25, 1915, addressed by the libelant to the Oregon-California Shipping Co., at Portland, Oregon, and ask you if that is not the first communication of any kind or nature in writing that you made to the Oregon-California Shipping Co. with reference to your shipment on the S. S. "Eureka"?

A. No, I considered L. Rubelli's Sons—

Q. I want a direct answer to this question.

A. No.

Q. Will you point out any communications in writing addressed to the Oregon-California Shipping Co.,

(Deposition of Anson J. Mitchell.)

at Portland, [209] Oregon, that is in evidence in this case, prior in date to Libelant's Exhibit 17, dated October 25, 1915?

Mr. WELLES.—Libelant objects and moves that this question be stricken out on the ground that the record speaks for itself.

A. (After looking through exhibits.) I am afraid I will have to withdraw that statement because that was the first telegram or written notice in writing addressed to the Oregon-California Shipping Company, at Portland, Oregon.

Q. Or addressed to the Oregon-California Shipping Co. at any other place, is it not?

A. I think so.

Q. Now, Mr. Mitchell, commencing with Libelant's Exhibit 17, dated October 25, 1915, addressed by the libelant to the Oregon-California Shipping Co., at Portland, Oregon, there followed, did there not, four communications from the libelant, or from you, as its traffic manager, to the Oregon-California Shipping Co., at Portland, Oregon, being respectively, telegram of October 27, 1915, Libelant's Exhibit 20; telegram of November 3, 1915, Libelant's Exhibit 23; telegram of November 4, 1915, Libelant's Exhibit 25, and telegram of November 5, 1915, Libelant's Exhibit 27? A. Yes.

Q. Is it not a fact that these five communications from the libelant, or you as its traffic manager, to the Oregon-California Shipping Co. comprise all of the written communications [210] from the libelant, or you as its traffic manager, to the Oregon-California

(Deposition of Anson J. Mitchell.)

Shipping Co. prior to the time that the Libelant's shipment on the S. S. "Eureka" was delivered to the libelant at New Orleans in the month of November 1915?

A. If my memory serves me correctly I addressed —I am positive that the communication I gave to Mr. Williams in the Santa Fe office at New Orleans was addressed to H. M. Williams, manager of the Oregon-California Shipping Co., in which I demanded the goods, and advised him regarding the claim.

Q. With that possible exception, these five communications to which you have heretofore referred comprise all of the written communications from the National Carbon Company or you as its traffic manager, to the Oregon-California Shipping Co., at Portland, prior to the delivery of the goods to you at New Orleans?

Mr. WELLES.—You mean direct to the Oregon-California Shipping Co.?

Mr. PLATT.—Direct to the Oregon-California Shipping Co.

A. As addressed to the Oregon-California Shipping Co.

Q. Did the National Carbon Company receive from the Oregon-California Shipping Co., a notification in writing that it had directed the ship to proceed from Colon to New Orleans for transshipment of the cargo, which written [211] communication was dated on or about October 24th, 1915?

A. No, we did not get one.

(Deposition of Anson J. Mitchell.)

Q. You were, however, advised, were you not, by your Pacific Coast agent by wire dated October 25, 1915, Libelant's Exhibit 18, that the libelant, as consignee at Pacific Coast points, had been notified of such contemplated diversion?

A. Yes, also by Rubelli's Sons as agents.

Q. Were you ever at Colon? A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the libelant to handle that portion of the cargo of the S. S. "Eureka" which was shipped by the National Carbon Company, during any time that the steamship "Eureka" was detained at the east side of the Panama Canal?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial upon the issue in this action.

A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, the American-Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.

[212] Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at any time during the time that the "Eureka" was detained at Colon, on the east side of the Panama Canal, for the handling of that

(Deposition of Anson J. Mitchell.)

portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes.

direct communications at any time while the 'Eureka

Q. Did the National Carbon Company address any direct communications at any time while the "Eureka" was detained at Colon, at the eastern entrance to the Panama Canal, to the ship or to the captain of the ship, in charge thereof? A. No.

Q. In the process of sealing dry batteries, that is, the application of the pitch, rosin and other compositions, is that put upon the head of the cell by machinery or by hand?

A. We have two or three different ways, we have a big kettle from which a pipe comes down over a rolling table or cart, you would call it, in which so many of these cells are loaded, and this spigot comes down, and the man operates it or lets it fall so much on each one. Then we have a can, such as a regular sprinkling can, with the sprinkling part, or course, left off, and that is poured on. Then we have also a common ordinary pitcher from which the seal is poured on to the top.

[213] Q. In other words, it is a hand process?

A. It is a hand process.

Q. Is there any reason why the sealing of these cells, being a hand process,—why this could not all have been done, the reconditioning of these cells could not have been done down at New Orleans?

(Deposition of Anson J. Mitchell.)

A. Yes, there is no way, it would cost more to have bought—

Q. That is not an answer to the question; I am asking you is there any reason, it being a hand process, why it could not have been done at New Orleans?

A. Yes, on account of the material not being at New Orleans.

Q. Suppose that you had taken down to New Orleans with you the necessary raw material and a workman, is there any reason why the cells could not all have been reconditioned at New Orleans?

A. At a much greater expense than what it would have been at the plant.

Q. Is there any reason why it could not have been done, any physical reason?

A. Not if we had equipped a plant for it.

Q. What is the cost of a pitcher?

A. I don't know.

Mr. WELLES.—Are you referring only to the resealing now, Mr. Platt?

Mr. PLATT.—Yes.

Q. Suppose that this valuable article, the pitcher, had been purchased, and a workman was present, and you [214] had the necessary amount of the wax material, is there any physical reason why these cells could not all have been resealed at New Orleans?

A. We would have to have had a room free from dust and also free from varying temperature, would have had to have a furnace with a graduated—well,

(Deposition of Anson J. Mitchell.)

they don't call it a thermometer, but something like that, which keeps the heat at a certain degree all the time, so as to pour evenly. It would have taken quite a lot of equipment to do that.

Q. Was there any physical reason why it could not have been done?

A. Not if properly equipped.

Q. What equipment would it have taken?

A. You will have to ask a practical man about that. I really don't know.

Q. Is there anything connected with the testing that could not have been done at New Orleans?

A. No, except we would have had to have a regular tester and the regular testing machine.

Q. All the testing you did at New Orleans was an irregular tester?

A. It was not a regular tester, I am not a regular tester.

Q. But you know how to test? A. Yes.

Q. But that is not a branch of your employment?

A. It is not.

[215] Q. In these various shipments to various points by rail or water, does the National Carbon Company insure against depreciation?

Same objection.

A. No, never.

Q. What is the capital stock of the National Carbon Company?

Objected to as incompetent, irrelevant and immaterial.

A. $17,500,000, if I remember correctly.

(Deposition of Anson J. Mitchell.)

Q. How many plants?

Same objection.

A. Thirteen. We have one at San Francisco, one on Long Island, one at Jersey City, one at Niagara Falls, one at Clarksburg, West Virginia, two at Cleveland, Ohio; one at Fremont, Ohio; One at Fostoria, Ohio; one at Noblesville, Indiana; one at Toronto, Ont., that is practically all that are really under the name of the National Carbon Company, the other two are subsidiary companies.

Q. They are owned by the National Carbon Company?

A. Will not be owned until the first of the year, put it that way.

Q. What proportion of the total output of all dry cells and carbon products are manufactured and sold by the **[216]** National Carbon Company?

A. Of the electric light carbon products, owing to the war, I presume 90% of those used in the world are now manufactured by the National Carbon Company. Of the electrode proposition we have approximately 40% of the electrodes in the country. Of the carbon brush proposition we have approximately 50%.

Mr. WELLES.—Libelant moves that all questions and answers relating to the size of the plants and the production of the National Carbon Company be stricken out as incompetent, irrelevant and immaterial.

Mr. PLATT.—It is deemed that the claimant has excepted, and the exception is a continuing one, to

(Deposition of Anson J. Mitchell.)

all objections made by the libelant to any interrogatory propounded by the claimant.

Q. And of the dry batteries?

Mr. WELLES.—Same objection and motion. This objection and motion shall be a continuing one.

A. Of the dry battery proposition we have approximately from 50 to 60% of that manufactured in the United States.

Q. Is it not a fact that subsequent to the delivery to the libelant at New Orleans of the shipment of the National Carbon Company on the steamship "Eureka" that the first communication of any kind addressed to the Oregon-California Shipping Co., at Portland, Oregon, or elsewhere, concerning any claim of damage, was Libelant's Exhibit 38, **[217]** dated January 11, 1915?

A. Yes, sir, that is the only one I can find addressed direct to the Oregon-California Shipping Company.

Q. Prior to the introduction in evidence at this hearing upon this date of Libelant's Exhibit 84, being a certain itemized statement, did the National Carbon Company prepare and present directly to the Oregon-California Shipping Co. any claim of its alleged damages arising out of three shipments covered by Libelant's Exhibits 1, 3 and 5, upon the SS. "Eureka," beyond and in addition to the communication of January 11, 1916, Libelant's Exhibit 38, subsequent to the date of the delivery of the shipment at New Orleans.

A. No. I will qualify that, I received a com-

(Deposition of Anson J. Mitchell.)

munication from our attorneys asking that we prepare and present to them a statement, as a demand had been made on them for a statement, from the "Eureka." This was done, and mailed to our attorneys on September 6, 1916. That statement did not contain freight nor the loss sustained by depreciation in price, owing to the fact that I was not conversant as to whether or not we were justly entitled to the same without taking it up with our attorneys.

Adjourned to 1:30 P. M.

[218] After recess, 1:30 P. M., December 20/15.

Met pursuant to adjournment.

Present as before.

Cross-examination of Mr. MITCHELL (Continued).

(By Mr. PLATT.)

Q. Referring now to Libelant's Exhibit 2, and to page 2 of Libelant's Exhibit 84, I note that in the former the value of the first shipment of dry cells, being the ones shipped from New York via. the steamship "Eureka" (Libelant's Exhibit 1, page 1), is given as $3111.25 plus 10%, whereas in the second page of Libelant's Exhibit 84 it is given as $3390.69; how does this discrepancy arise?

A. I can explain that this way, that this invoice, Exhibit 2, at first was only to be used as an insurance charge, and was to be what we considered a notice to the steamship company as to the actual value or what we figure cost value.

Q. It is merely, then, a more accurate recapitulation of the original invoice, Libelant's Exhibit 2, of the actual value of the goods as shipped?

(Deposition of Anson J. Mitchell.)

A. Yes, it is practically the real value; page 2 of the last exhibit is the true value.

Q. What is the 10% added to the value of the shipment as otherwise fixed in Libelant's Exhibit 2?

[219] A. It is an arbitrary charge which we usually have applied to cover freight and insurance and cost when figuring covering factory movements.

Q. You have got that same 10% in the value as figured on page 2 of Libelant's Exhibit 84?

A. No, not that 10%.

Q. That is left off?

A. That is left off entirely.

Q. Referring again to page 2 of Libelant's Exhibit 84, the item of cost of August 31, 1915, $3,390.69, how many dry cells does that represent?

A. A copy of that exhibit is attached to it, which shows the whole thing, shown on page 3.

Q. These prices per cell named on page 3 of Libelant's Exhibit 84, what do they represent, the wholesale or retail price? A. Wholesale price.

Q. The net wholesale price?

A. Net wholesale price.

Q. As in general use in your entire corporate activity? A. Yes, sir.

Q. The same is true as to the items on page 2, covering shipment which left Cleveland on September 4, 1915, being the bill of lading, Libelant's Exhibit 3, and the shipment that left Cleveland September 4, 1915, covered by bill of lading, Libelant's Exhibit 5?

A. Yes, and copies of those invoices, the contents, are attached as sheets 4 and 5.

(Deposition of Anson J. Mitchell.)

Q. I notice in making up your statement, Exhibit 84, that on the first page you have added to the net difference **[220]** between what you claim was the net wholesale price less certain expenses, an item of 2% depreciation of market, what do you mean by that?

A. Had those cells been delivered at destination, instead of getting a basis of 26 to 27 cents at destination we would have gotten 29 to 30 cents.

Q. You mean that you believe that if your Pacific Coast distributing branches had received these goods at the time that you expected that they would be delivered, in the ordinary course of the voyage of the "Eureka," that they would have been able to sell them in the market at two cents apiece average over what they subsequently got for some others?

A. Yes, I can qualify that this way, had those been delivered in the usual course of 23 or 27 or 28 days they would have reached San Francisco and been sold prior to the time when the price of dry batteries was reduced two cents per cell, which price went into effect all over the United States at the same time.

Q. Who reduced the price? A. We did.

Q. So that the reduction in price of two cents per cell which you are now claiming as damages was a voluntary act on the part of the libelant?

A. Owing to the fact that the price of zinc, manganese ore and coke, the constituent elements of the raw materials of the batteries was reduced, which permitted this reduction.

(Deposition of Anson J. Mitchell.)

Q. And the said reduction was the voluntary act of the **[221]** National Carbon Company?

A. Yes, following the policy which we always adopt in taking contracts or making sales, we always notify, and it is understood by all jobbers that our price will fluctuate according to the price of raw materials, when the price of raw material is higher we have the privilege of increasing the price of our cells, when the price of raw material is reduced or goes down we have given and do give a reduction in price on our cells.

Q. Now, in the transportation of cells which you claim to have sent to the Pacific Coast to supply your branches there, in the place of those which were turned over to you at New Orleans from the S.S. "Eureka," I note on page 1 of Libelant's Exhibit 84 that you charge for freight at the rate of $1.25 per hundred weight? A. Yes.

Q. In your oral testimony on that subject you gave the net extra freight as $787.67, whereas on page 1 of Libelant's Exhibit 84 and nowhere else in the claim is a credit given for the difference which you gave in your oral testimony; how do you account for that?

A. Because I paid over to the "Eureka" people and had no refund, and they had not taken the cargo around,—then to replace that I had to pay another $1.25 per hundred weight to carry these cells from my factory to their destination.

Q. Have you not figured in your claim that original 50 cents freight?

A. No, I have not included that at all.

(Deposition of Anson J. Mitchell.)

[222] Q. Is not that included in the invoice price of these cells as you have just delineated them?

A. No, it is not.

Q. That $1.25 per hundred weight which you are now seeking to charge against the ship for the claimed substitution of cells for Pacific Coast consumption was the overland rail rate? A. It was.

Q. When do you claim those substituted cells were shipped to the Pacific Coast?

A. That would be a very hard question to answer, to give you the exact date, because just as soon as we realized that the Canal was closed, and also during the time when the Canal was open, we were shipping batteries all rail.

Q. Did you, as a matter of fact, ship any specific batteries to the number of 45,775 that was included in the "Eureka" shipment, specifically in substitution for that quantity, or are you now simply including in your bill, Libelant's Exhibit 84, an equivalent number at the all-rail rate which you were shipping contemporaneously with the shipments that went by the S.S. "Eureka"?

A. Certain cells in these shipments were special, going to the Navy; certain other cells were special, going to special customers, and it was therefore necessary for us to make up special cells and duplicate orders, and shipments by rail of the cells that were originally on the "Eureka" in order to take their place.

[223] Q. Is it not a fact that on the Cleveland invoice of August 31, 1915, page 3 of Libelant's Ex-

(Deposition of Anson J. Mitchell.)

hibit 84, 10,750 2½ by 6 Columbia Ignitor Cells, Screw Conn, appears; on the Cleveland invoice of September 4, 1915, page 4 of the same exhibit, 13,500 of the same, on the Cleveland invoice of September 4, 1915, page 5 of the same exhibit 10,750 of the same,—those were not specials, were they?

A. No.

Q. That is the standard size?

A. That is the standard size.

Q. So that out of a total of 45,000 the number of specials were decidedly limited in number, as shown by these invoices? A. Yes.

Q. So to go back now to the inquiry, you have in this compilation, exhibit 84, attempted to charge up against the ship the freights, all rail, on an equivalent number of cells of the same character, not specifically shipped in substitution of the shipments delivered and received by you at New Orleans from the "Eureka," but from your general shipments to the Pacific Coast?

Mr. WELLES.—I object to the question on the ground that it is not sufficiently definite to be answered by the witness; not sufficiently clear.

A. I am only charging freight on the cells which were used to replace the cells shipped on the original orders by the SS. "Eureka."

[224] Q. That being true, give us now the dates of those substituted shipments, the car numbers, the quantities, the amount paid out in freight, in order that we may determine when these substitutions took place?

(Deposition of Anson J. Mitchell.)

A. I would have to secure that from the records at Cleveland.

Q. As a matter of fact, Mr. Mitchell, you were shipping by rail as well as by water at these different cut rates that you got from the steamship companies batteries from your various eastern plants, including the one at Cleveland, from which the "Eureka" shipment originated, to the Pacific Coast?

A. Yes.

Q. And as a matter of fact, if you had all your Cleveland records here, you could not pick out, could you, any specific shipment which you would be able to say as an absolute matter of fact was in substitution for the "Eureka" shipment?

A. I believe I can, because whenever an order is destroyed, or whenever an order is cancelled, and afterwards reissued, there is what is called a replacing order. Now, these orders were what we call unfilled, and I have every reason to believe that I can give you specific records of cars covering the identical goods as made up from this cancellation of order.

Q. Assuming, now, that that is true, these goods were all shipped on the "Eureka" by the National Carbon Company to the National Carbon Company on the Pacific Coast? A. Yes.

[225] Q. For resale there by the libelant?

A. Yes.

Q. Was there any time subsequent to the nondelivery or nonreceipt of these goods on the Pacific Coast from the "Eureka" that the National Carbon

(Deposition of Anson J. Mitchell.)

Company was out of carbon dry cells to sell on the Pacific Coast? A. I think so.

Q. That being so, why did you reduce the price per cell two cents, when you were short of goods for that market, and attempt to charge that up to the vessel?

A. Because the San Francisco trade is practically, —well, it is a very small part of our business.

Q. Why didn't you raise the price, if the Pacific Coast market was greater than your supply, and keep down the damages in this case instead of voluntarily marking the price down and then attempting to add the freight on the substituted shipment in addition?

A. Because our competitors on the Pacific Coast had cells and were able to ship them out immediately, and therefore take the trade, which we would naturally have taken care of had we the cells there.

Q. In addition to what you were shipping overland, you were shipping by other steamers than the "Eureka," were you not? A. Yes, sir.

Q. And you were getting rates of carriage all the way from 80 cents a hundred down, were you not?

A. Yes.

Q. You shipped subsequent to the "Eureka" by the Panama [226] Canal, after it was opened, did you not? A. Do you mean lately?

Q. Subsequently to the opening of the Panama Canal, after the slide that detained the "Eureka"?

A. We have not shipped any by water since that time.

(Deposition of Anson J. Mitchell.)

Q. Why?

A. Well, because of the scarcity of boats.

Mr. WELLES.—Libelant objects and moves that the question and answer be stricken out as incompetent, irrelevant and immaterial to the issues of this action.

A. Any other reason?

A. No, I don't know of any other reason except that we have not had a price, there have been no boats offered going around that way. We intend to ship that way, that is, after the war is over, if the freights go down to normal.

Q. Turning now to Libelant's Exhibit 31, how do you account for the fact that this shipment was made in the month of November, and the freight is stamped paid in December, 1915?

A. For this reason, that the freight prepaid mark is put on by one of our time clerks.

Q. So that those three stamps giving the date of the freight prepaid is an office memorandum in the office of the National Carbon Company, and has no relation to the date that the freight was actually paid by you at New Orleans? A. No.

[227] Q. In working out this credit which you have made for the 15 barrels short shipped, as shown on Libelant's Exhibit 84, did you include in that credit merely the Cleveland wholesale price, and did you add thereto the saving of two cents per cell alleged to be due to the depreciation of market, alleged difference in freight to Pacific Coast points which you saved, and the other items which you saved by

(Deposition of Anson J. Mitchell.)

not having them included in the "Eureka" shipment?

A. If you will specify what other items you mean I will be glad to answer that.

Q. Hotel expenses and tips?

A. Yes, sir; I did; I included in the credit of $531.97 the two cents per cell which amounted to $36.50, the freight for replacing, $56.25, and the price of the cells, which would be 1875 cells at the price of .23425 cents, being a total of $438.22, making a grand total of $531.97.

Q. I now hand you Libelant's Exhibit 13, which contains the statement "you must understand the National Carbon Company have legally notified us that they have $50,000 worth of goods on board," that is a mistake in amount, is it not?

A. Should have been $15,000.

Q. Approximately?

A. Approximately, yes. An error of the stenographer.

Redirect Examination by Mr. WELLES.

Q. Why were these shipments that were not delivered by [228] the "Eureka" replaced in California from your Cleveland plant?

A. Because some of them were special and also we had to keep a supply of goods in California so as to meet the orders, or to fill the orders from our customers, so that it was absolutely necessary that we supply a replacing order.

Q. Could the California orders be supplied from any of your other plants at that time?

(Deposition of Anson J. Mitchell.)

A. Well, we might have shipped them from Fremont, which is adjoining to Cleveland.

Q. Would there be any difference in the freight or other charges which you have testified to if they had been shipped from the Fremont Plant?

A. No, this freight rate of $1.25 is what is called the postal rate, and applies from all points of the United States east of the Missouri River.

Q. Was the rate the same from New Orleans?

A. It was.

Q. And the same from Jersey City? A. It was.

Q. Referring to the reduction of two cents in the price of these batteries when sold, were they sold at the market price in San Francisco and other California points at that time? A. Yes.

Q. Could you have gotten more for them at that time than the price at which you sold them?

A. Had these goods been delivered in the usual length of time which [229] we expected they would have been when shipped, we would have gotten two cents per cell more.

Q. I refer to the goods that you actually did sell, that were necessary to replace the cells that were not delivered to you, did you get for those the full market price at the places where they were sold?

A. Yes, sir, we did.

Q. And have you based your amount of damages upon such full market price? A. Yes.

Q. Then that reduction was not a voluntary reduction on the part of the National Carbon Company, was it?

(Deposition of Anson J. Mitchell.)

A. Not as far as these particular cells were concerned, no.

Q. It was due entirely to market conditions, was it? A. Entirely.

Q. What proportion of this shipment consisted of special cells,—I refer to the shipment which was on the "Eureka"?

A. Approximately 4 to 5 per cent.

Q. When the "Eureka" shipments were sent back from New Orleans on the railroad, was the freight prepaid on those shipments? A. It was.

Q. Do you recall when it was prepaid?

A. I think it was prepaid either the day before or the day after Thanksgiving, and that was November 25th, either the 24th or the 26th, of November.

Q. Had the bills of lading been delivered to you before [230] it was prepaid?

A. I think the bills of lading were submitted to me on the afternoon of the 23d or the morning of the 24th. At that time they didn't have the expense bill ready covering the prepaid charges. Mr. Tate, who delivered the bills of lading, stated that he would have that expense bill in the afternoon or the day after Thanksgiving, and I am now more than ever convinced that the freight was prepaid the day after Thanksgiving instead of the day before, which would be the 26th.

Q. Did he give any reason for his delay in not having the expense bill ready?

A. Yes, the goods were not released by the railroad company until the afternoon of the 23d.

(Deposition of Anson J. Mitchell.)

Q. Why were they not released?

A. On account of financial matters between the steamship company's attorney and the railroads who had figured on hauling the cargo away from New Orleans.

Q. Did they refuse to deliver you those goods until those financial matters were adjusted?

A. They did.

(By Mr. PLATT.)

Q. Who did? A. The railroads.

Q. Did the railroads have your stuff?

A. Yes, it was all loaded on the cars, they held it in trust for the steamship company until—well, I won't say that, there was no arrangement to take care of this, the total charges [231] and other charges, and also they had to get permission from their consignee or consignor as to whether or not they would accept the freight at the other end with the advanced charges from New Orleans to New York, there was quite a controversy, and I think Mr. Williams could straighten it out.

Q. In other words, the ship would not let go of the goods until the carrier, the company, engaged in the carriage, had satisfied its maritime lien on the goods for its transportation charges of the vessel from the point of origin to New Orleans?

A. Of course I don't know just exactly the legal reason why, but that is the impression I was getting.

(By Mr. WELLES.)

Q. Had you offered to prepay your freight on these goods before this time? A. Yes.

(Deposition of Anson J. Mitchell.)

Q. Did you prepay that freight and all charges to the agents of the railroad company who were there at that time? A. Yes.

Q. I show you a letter Mr. Mitchell, headed Oregon-California Shipping Co., Inc., dated at Philadelphia, September 4, 1915, and ask you if that is the original letter received by you from the Oregon-California Shipping Co., Inc., in this action, under that date? A. It is.

Mr. WELLES.—I offer the letter in evidence.

[232] Mr. PLATT.—Objected to on the ground that it is not a letter of the Oregon-California Shipping Co., Inc., and does not purport to be. It is a letter purporting to be signed by R. B. Bates, assistant traffic manager of L. Rubelli's Sons, and in accordance with Libelant's Exhibits 33, 37, 39 and 40, heretofore introduced in evidence, by offering which the libelant is bound, it is specifically stated that the party signatory to the letter now offered in evidence and the firm with which he was connected were not the general agents of the Oregon-California Shipping Company, never had been, and were merely the agents for the solicitation of freight, and for each and all of these reasons as well as the continuing objections heretofore briefly noted, the instrument is incompetent, irrelevant and immaterial.

Same exception.

The letter is marked Libelant's Exhibit 85.

Q. Does this letter relate to part of the shipment involved in this action? A. It does.

Q. Were these shipments made in pursuance of

(Deposition of Anson J. Mitchell.)

this letter? A. They were.

(By Mr. PLATT.)

Q. Could you have sold these cells which you claim to [233] have shipped to the Pacific Coast in substitution of the cargo of the steamship "Eureka" if you had not voluntarily reduced the price two cents per cell? A. At that time, you mean?

Q. At the time that you shipped them, at the time they reached San Francisco, or within a reasonable commercial time thereafter during the life of the cells? A. No, not at that price.

(By Mr. WELLES.)

Q. You mean at the two cents additional?

A. Yes.

(By Mr. PLATT.)

Q. Could not have sold them at all? A. No.

Q. You are positive of that? A. Yes.

Q. Your company controlling 60% of the output of dry cells in the United States? A. No.

Q. Could not have sold them on the Pacific Coast unless you had voluntarily reduced the price two cents? A. Not this lot, no.

Q. Could you have sold them during their commercial life? A. No.

Q. Within eight months after their manufacture?

A. Well, now, I could not say that because I don't know when the price was advanced, probably four or five months afterward, when I don't know.

Q. So you could have sold them within four or five [234] months at the "Eureka" price?

(Deposition of Anson J. Mitchell.)

A. If the price was advanced then, yes, but I don't know.

Q. To the best of your recollection, it was advanced?

A. I think four or five months afterward.

(By Mr. WELLES.)

Q. You could not have sold them as first-class cells? A. No.

(By Mr. PLATT.)

Q. Why could you not have sold them within that time as first-class cells?

A. Because we always make it a rule and also it is understood by all of our jobbers and customers that after 90 days a battery is liable to deteriorate, and is hence not what is called an A1 cell, that is practically a trade condition.

(By Mr. WELLES.)

Q. How much difference in price does that make between first and second class cells?

A. It depends entirely on whether we can use them.

Q. At this time?

A. I could not tell, we would have to be governed at that time as to where we could have shipped those.

Q. You could not have sold those in the market at that time? A. No, sir.

Q. It would have been necessary to reship them and sell them somewhere else?

A. Well, I would not say that, because part of them could have gone out to our people who [235] only use a dry battery intermittently, in other words,

(Deposition of Anson J. Mitchell.)
as button work and telephone work and things like that.

Q. So that when the price went up again these cells would not have been available as first-class cells.

A. Not to the trade indiscriminately.

Q. And it would have involved extra expense in order to have marketed them? A. Yes, sir.

(By Mr. PLATT.)

Q. What do you mean by extra expense?

A. We have got to arrange everything, and also got to test them, which means the running of what we call a test.

(By Mr. WELLES.)

Q. And you would have to ship them to other points?

A. Have to ship them in small lots like we did these lots here.

Deposition of Edwin J. Wilson, for Libelant.

[236] EDWIN J. WILSON, recalled.

Redirect Examination by Mr. WELLES.

Q. Are all these batteries which you have mentioned in detail all of the batteries that arrived at your plant from New Orleans ex S. S. "Eureka"?

A. No, that is not all.

Q. What other ones were there?

A. There was a certain percentage of scrap batteries that were not good enough to recondition.

Q. When did these batteries arrive at your Jersey City plant from the "Eureka"?

A. December 6, 1915.

(Deposition of Edwin J. Wilson.)

Mr. PLATT.—Cross-examination closed.

It is hereby stipulated between the parties that the Alaska Steamship Company, claimant, is a corporation under the laws of the State of Nevada, with its principal office and place of business in the city of Seattle, State of Washington; that it is the owner of the steamship "Eureka," and was at the date of the filing of the libel in this case; that on the 8th of September, 1915, the steamship "Eureka" was owned by the Pacific Coast Steamship Company, a corporation, which had chartered said steamship to the Crossett [237] Western Lumber Company, a corporation, and that said Crossett Western Lumber Company had chartered the said steamship to H. M. Williams, Inc., a corporation, which in turn had chartered said steamship to the Oregon-California Shipping Co., Inc., a corporation, and that prior to the filing of the libel in this action said Alaska Steamship Company purchased the entire ownership of the said steamship "Eureka" from the said Pacific Coast Steamship Company, and the said Alaska Steamship Company is now the sole owner thereof.

Deposition of William A. Richey, for Libelant (Recalled).

[238] WILLIAM A. RICHEY, recalled for further cross-examination.

(By Mr. PLATT.)

Q. Mr. Richey, will you state at this time the ingredients, giving the name of each, both the chemical name and the name in common usage, if different

(Deposition of William A. Richey.)

from the chemical name, of each and every ingredient, together with the quantity thereof, that entered into the manufacture of the seals used on the dry cells which were the subject matter of this shipment which you examined, as heretofore stated?

A. The seals for these batteries were made at the Cleveland plant, and of course, as to just the exact amount put into them I could not answer.

Q. You have heretofore testified from within your knowledge as one of the chemists of the National Carbon Company that the system of manufacture and the ingredients used in the manufacture of seals for dry cells are uniform?

A. I can give, as we use at our plant, and as I understand are used at the other plants, the ingredients.

Q. All right, go ahead.

A. The seals for these batteries were of red seal and black seal. The black seal is made from hard pitch, that is, as we make it, there may be some changes,—hard pitch 60% or thereabouts, and soft pitch approximately 25%; talc, which is a silicate of magnesium, approximately 15%. The red seal, which [239] is used for a finishing seal on one grade of batteries, consists of rosin, 50%; venetian red, which is an oxide of iron,—$Fe_2 O_3$—chemically, that is two parts of iron and three of oxygen, 7% of venetian red; silica sand, which is ordinary silicate, 32%; talc, which is magnesium silicate, largely, 10%. In some of the seals, a small percentage, say perhaps one, of hydrated lime is added for its effect upon the

(Deposition of William A. Richey.)

melting point of the seal. That constitutes the ingredients.

Q. As I understand you in these three shipments covered by Libelant's Exhibits 1, 3 and 5, all of the seals, to the best of your chemical knowledge and belief, were manufactured from either one or the other of the two formulae which you have just mentioned?

A. Yes.

Q. Did these seals differ in manufacture, as to ingredients and method of manufacture, from the method of manufacture and ingredients used in the seals shipped out for your regular trade, other than that you have added or there has been added or was added this hydrated lime for the purpose of retarding the melting point of those particular seals, due to their tropical carriage?

A. The various factories determine the slight changes in proportion that they use in these materials; that depends upon the quality of the various raw materials that go into it, differ very slightly from time to time.

[240] Q. You mean by raw material the other ingredients that are going into the seal?

A. Yes, the raw materials, of course, are those ingredients from which the finished material is made.

Q. I don't recall whether I got an answer to the inquiry whether the National Carbon Company in manufacturing the seals to be put upon their dry batteries for transportation to the tropics, used the same formulae that they would for transportation in temperate climates, except that there is added the

(Deposition of William A. Richey.)

additional element of hydrated lime for the purpose of retarding the melting point?

A. In some cases the percentage of hard pitch is increased so as to maintain a melting point sufficiently high to meet these conditions.

Q. Increased beyond the percentage which you have given in the formula? A. It is; yes.

Q. What would it be as to the seals in question?

A. I would give what is as I understand sometimes used as a percentage, the percentages of these are changed slightly as to the increase of the melting point, so that the percentage of hard pitch might be increased to 75; the soft pitch would be 10% and the talc would be 15%.

Q. Without any hydrated lime?

A. That is just the black seal, the hydrated lime, you understand, went into the red seal only.

[241] Q. For tropical carriage would you alter the proportions of the ingredients in the red seal?

A. The melting point, if not sufficiently high, might be increased by slightly increasing the percentage of hydrated lime, which is sometimes done.

Q. And if the formula was so recast, how would it then read?

A. Under those conditions the rosin would approximate 50%, the venetian red 7%, silica sand 31%, talc 10% and hydrated lime might be increased as much as 2%,—might be made as much as 2%, not increased.

Q. From your examination of the seals on the shipment that came back to the Jersey City plant

(Deposition of William A. Richey.)

from New Orleans from the S. S. "Eureka," were the cells made according to the revised formulae which you have given for black and red seals, increasing the quantity of hard pitch in the former and of hydrated lime in the latter, to advance the melting point, or were they manufactured according to the first named two formulae?

A. I made no detailed quantative examination of these, and I could not say as to which formula it came under.

Q. You don't know, then, as a matter of fact, whether these seals were made according to the accepted formulae for tropical carriage or not?

A. I cannot answer that.

Q. The first named formulae that you gave was the standard temperate zone formulae and the second two might be called the standard tropical formulae?

A. Yes.

[242] Q. Can you tell what proportion of the shipment, in a general way, not attempting to make it absolute, was black and what proportion of it red seal batteries?

A. I should say 75% were finished with the red seal.

Q. Provided the seal remains intact, being properly constructed, so as to keep out air or moisture, is there any chemical action going on inside of the battery which is affected by either heat or cold, as such?

A. There is.

Q. To what extent is the diminishing life of a battery accelerated by external heat, not sufficient to

(Deposition of William A. Richey.)

produce such a melting of the seal as to permit the entrance of external air or heat?

A. The action of a cell under the influence of heat, even though the seal remains intact, goes on rapidly under the influence of external heat,—goes on more rapidly under the influence of external heat than it does where the temperature is moderate or lower.

Q. That being so, it necessarily follows, does it not, that in the summers of a temperate climate the deterioration in the cell goes on more rapidly where the temperature is not sufficiently warm to affect the seal, than it would in the fall or spring or winter of that same temperate climate?

A. The chemical action in a cell is increased by the effect of heat, always.

Q. So that in shipping dry cells from the Atlantic Coast to the Pacific Coast through the tropics, you know [243] in advance that the deterioration or shortening of the life of the cell would go on more rapidly than it would if you shipped those same dry cells overland through the temperate zone by rail, isn't that a fact?

A. We expect the action to be increased as the heat increases, more or less.

Q. How do you retorch the seals, explain the process?

A. The retorching is done by a blast lamp; a blast lamp is the apparatus used.

Q. Such as a plumber uses?

A. It is a torch that is constructed so that it is fed both by gas and by air.

(Deposition of William A. Richey.)

Q. Similar to that used by plumbers and steam fitters? A. No, not as I understand it.

Q. Explain the difference, if you can, in the one that you did use?

A. The torch that is used is fitted so that it has an air inlet and a gas inlet, the gas and air are admitted at the rear end of the tube or torch, they are mixed at the end where the gas is ignited. Of course the mixing of the gas and the air makes the combustion of the gas more complete.

Q. This torch, so constructed, is applied in what way to retorch dry cells?

A. The flame is simply played over the top of the seal so as to soften the surface of the seal and cause it to flow together, making a smooth finish.

[244] Q. Are these torches movable?

A. They are.

Q. And operated by hand? A. They are.

Q. How do you rejacket damaged dry cells?

A. The process of jacketing consists of putting the cell into a round cardboard jacket, made so as to fit the can very snugly.

Q. It has printed matter on the outside of it?

A. Yes.

Q. Fastened on with what, is it all perpared so that it does not have to have any glue or other substance after it is placed outside of the can?

A. There is no cementing fluid or anything of that kind that fastens the jacket to the can.

Q. It fits tight, in other words?

A. It fits sufficiently tight.

(Deposition of William A. Richey.)

Q. Explain the process of reconditioning a damaged dry cell?

A. By reconditioning we simply mean putting the cell in a proper condition, what we consider a finished condition, rather, so that it presents the appearance of an original cell.

Q. Not only the appearance, but also the electrical power of either the original cell or one which is commercially salable?

A. In reconditioning the electric power of course is not changed.

Q. Well, supposing that in testing, it would not test up to your minimum, you recondition it so as to put it above the minimum, do you not?

A. The reconditioning generally does not consist in increasing the electrical [245] energy.

Q. What do you call that process?

A. We do not understand that the electrical energy on reconditioning can be increased.

Q. In other words, the 50% of the "Eureka" shipment which you have heretofore testified that you reconditioned in order to bring them up to the commercial standard, did not require any addition to its electrical constituents?

A. We made no addition, no change in the electrical—that is, in the special constituents of the dry battery.

Q. Did you do anything, as a matter of fact, except to retorch the seals which showed melting, rejacket the jackets that had been scuffed, and repack them?

(Deposition of William A. Richey.)

A. To my knowledge that constitutes the reconditioning that was done.

(By Mr. WELLES.)

Q. Is it not a fact that some of the cells in this lot were so far gone that they could not be reconditioned? A. It is.

Q. And were thrown into scrap?

A. Thrown into scrap.

(By Mr. PLATT.)

Q. Do you know what percentage?

A. No, I cannot give the percentage on that.

Q. It was very small, was it not?

A. Well, I would not say as to that, I did not do the final sorting of them.

[246] Redirect Examination by Mr. WELLES.

Q. As I understand, your practice is that if a cell is not in sufficiently good condition so that it can be fixed up or reconditioned and shipped again as a first-class cell or cell of a lower grade, you simply discard it and replace it with another one from the factory, is that right? A. That is true.

Q. You don't try to refill the cans?

A. We make no attempt to replace the essential constituents of a dry cell.

Q. What is the significance of red seals and black seals, is it anything more than a mere coloring for trade purposes?

A. The red seal finish is required by certain customers, I should say, or rather we make a distinctive brand with the red seal finish; of course it characterizes that particular brand.

(Deposition of William A. Richey.)

Q. Don't you know the reason for using red and black seals?

A. The reason for using the red seal is that it characterizes the particular grade of cell.

Q. Is the black seal just as good a cell in general as the red seal?

A. A black seal, as far as the electrical service is concerned, is as good as the red.

Q. Both the black seal and the red seal battery are practically the same, so far as electrical efficiency is concerned? A. Yes.

Q. And both sell as first-class batteries?

A. Both [247] sell as first-class batteries.

Q. It is merely a difference of brand, is that it?

A. It is.

Q. The system in your plant, I believe you have stated, is the same as in all other plants of the National Carbon Company?

A. As far as I know the same system is carried out throughout all the factories.

Q. It is certainly the same as the Cleveland plant, from your own observation? A. Yes.

Q. When you are shipping dry batteries for use in the tropics, or for passing through the tropics, you always use what is known as the tropic class of cell, with extra high melting point?

A. We make a special seal for the tropical shipments.

Q. That is, a seal with a high melting point?

A. It is.

Q. With these tropical cells, is there very much

(Deposition of William A. Richey.)

difference in the time they last in summer weather as compared with winter weather?

A. We understand no distinction between the life of the cells during the summer or winter months.

Q. There is an increase of depreciation in warm weather, you testified?

A. Yes, there is more action.

Q. That is, they are more active chemically?

A. Yes.

Q. Your object in putting out a cell is to try and get rid of all possible chemical action?

[248] A. The object is to make a cell in which the chemical action will be reduced to the minimum.

Q. While the cell is dormant?

A. While the cell is dormant.

Q. When you speak of increased chemical activity you mean as shown by a pretty delicate test, the difference between the warm weather and the cold?

A. That is determined by what we call corrosion, where we measure the loss, take the loss of the zinc element over a certain definite length of time.

Q. You provide for any deterioration caused by such an increase, don't you?

A. We always consider that point in so far as we are able, we make preparations to meet the conditions to which we think the cell is to be exposed.

Q. And so design it that it will be good for use for about six months?

A. As far as we are able to say?

Q. And salable for that time?

A. They should be salable for six months.

(Deposition of William A. Richey.)

Q. Does the difference between this summer heat and the cool weather, in increasing the activity of the cell, make any real commercial difference to it?

A. We do not recognize any distinction between those conditions, that is, as far as the commercial value of the cell is concerned.

Q. Then you disregard, as I understand it, any difference commercially as to changes of temperature throughout [249] the year, in relation to its effect on the increased activity of the cell; in other words, it makes no difference as far as the cell and the ordinary life of a cell is concerned, whether it is exposed to ordinary summer weather or whether it is exposed to fall or winter weather, does it?

A. As I understand, you refer to a certain range of temperature.

Q. You testified that in ordinary summer weather there would be an increased activity in the cell; do you recall that? A. Yes, that is true.

Q. I am asking you whether that increased activity, due to that difference in temperature, summer weather over cool weather, is sufficient to have any commercial effect or practical effect on the sale of those cells or is it merely a trifling difference?

A. As far as I know it is not taken into consideration in the making of the cells.

Q. I mean does it affect the cell or the class at all, does it make any change?

A. No, it does not affect the sale of them.

It is hereby stipulated, consented and agreed that S. Isabel Classon, notary public, was and hereby is

substituted as notary public and stenographer in the place and stead of C. May Hudson, [250] the person designated in the notice of taking the depositions, and that all of the said witnesses were duly sworn by the said S. Isabel Classon, before taking their said testimony, both in New York and Pennsylvania, with waiver as to time and place, and that said S. Isabel Classon had full authority to take such oaths, and that the claimant has not called the witnesses H. M. Williams and R. H. Baggott.

It is stipulated between counsel for both parties that the taxable costs of the stenographer and notary for taking these depositions is $248.45.

[251] *United States District Court, Western District of Washington.*

NATIONAL CARBON COMPANY,

Libelant,

against

Steamship "EUREKA," Her Engines, etc.

State of New York,
County of New York,
Southern District of New York,—ss.

I, S. Isabel Classon, a notary public in and for the county of New York, State of New York, duly appointed and empowered to act in and for the County of New York, State of New York, Southern District of New York, and duly authorized under and by virtue of the Acts of Congress and of the United States and of the Revised Statutes to take deposi-

tions *de bene esse* in civil cases depending in the courts of the United States, do hereby certify;

That the foregoing depositions of Anson J. Mitchell, Francis G. Coxon, Edwin J. Wilson, William A. Richey and Charles Kurz, were taken on behalf of the libelant before me, the depositions of the said Anson J. [252] Mitchell, Francis G. Coxon, Edwin J. Wilson, and William A. Richey being taken at the offices of Messrs. Harrington, Bigham & Englar, 64 Wall Street, New York City, N. Y., and the deposition of the said Charles Kurz being taken at the office of the Philadelphia Shipping Co., Room 551, Bullitt Building, 135 South 4th Street, Philadelphia, Pa., pursuant to agreement of counsel; that I was attended upon the taking of said depositions by Frank C. Welles, Esq., of the firm of Harrington, Bigham & Englar, proctors for the libelant, and by Robert Treat Platt, Esq., of the firm of Messrs. Platt & Platt, Portland, Oregon, proctors for claimant and the S. S. "Eureka"; that said witnesses were by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and that they were thereupon examined by counsel present; that I took down their testimony in shorthand, and caused the same to be transcribed in writing by a person under my personal supervision and who is not interested in this cause; that no other persons were present than those above named, and that hereto annexed are Libelant's Exhibits 1 to 85 inclusive, and Claimant's Exhibits "A" to "M," inclusive, referred to in said depositions.

I have retained the said depositions in my posses-

sion for the purpose of delivering the same with my own hand into the United States Postoffice in the city of New York in an enclosed post-paid wrapper addressed to the clerk [253] of the United States District Court, Western District of Washington, Southern Division, Tacoma, Washington.

I further certify that I am not of counsel or attorney for any of the parties in said depositions or in said caption named, nor in any way interested in the event of the above suit.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal this 22d day of December, 1916.

My commission expires March 30, 1917.

[Seal] S. ISABEL CLASSON,
Notary Public, Kings Co.

Certif. filed in N. Y. Co. #213. Reg. Off. #7189.

Certificate of Clerk of United States District Court to Original Depositions and Exhibits.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached depositions with exhibits attached thereto constitute all of the original depositions with all of the original exhibits thereto attached, which were filed and introduced in evidence in the case of National Carbon Company, a Corporation, Libellant,

vs. Steamship "Eureka," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., Respondent, and Alaska Steamship Company, a Corporation, Claimant, No. 2049 in said District Court at Tacoma, and required by stipulation of proctors and order of Court to be sent up to the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of said District Court as a part of the Apostles on Appeal in said cause.

ATTEST my hand and the seal of said District Court at Tacoma this 22d day of December, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy Clerk.

[Endorsed]: No. 3102. United States Circuit Court of Appeals for the Ninth Circuit. National Carbon Company, a Corporation, Appellant, vs. Alaska Steamship Company, a Corporation, Claimant of the Steamship "Eureka," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., Appellee. Libelant's Exhibit No. 1—Depositions on Behalf of Libelant, etc. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed December 26, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

No. 3102

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL CARBON COMPANY,
Appellant,

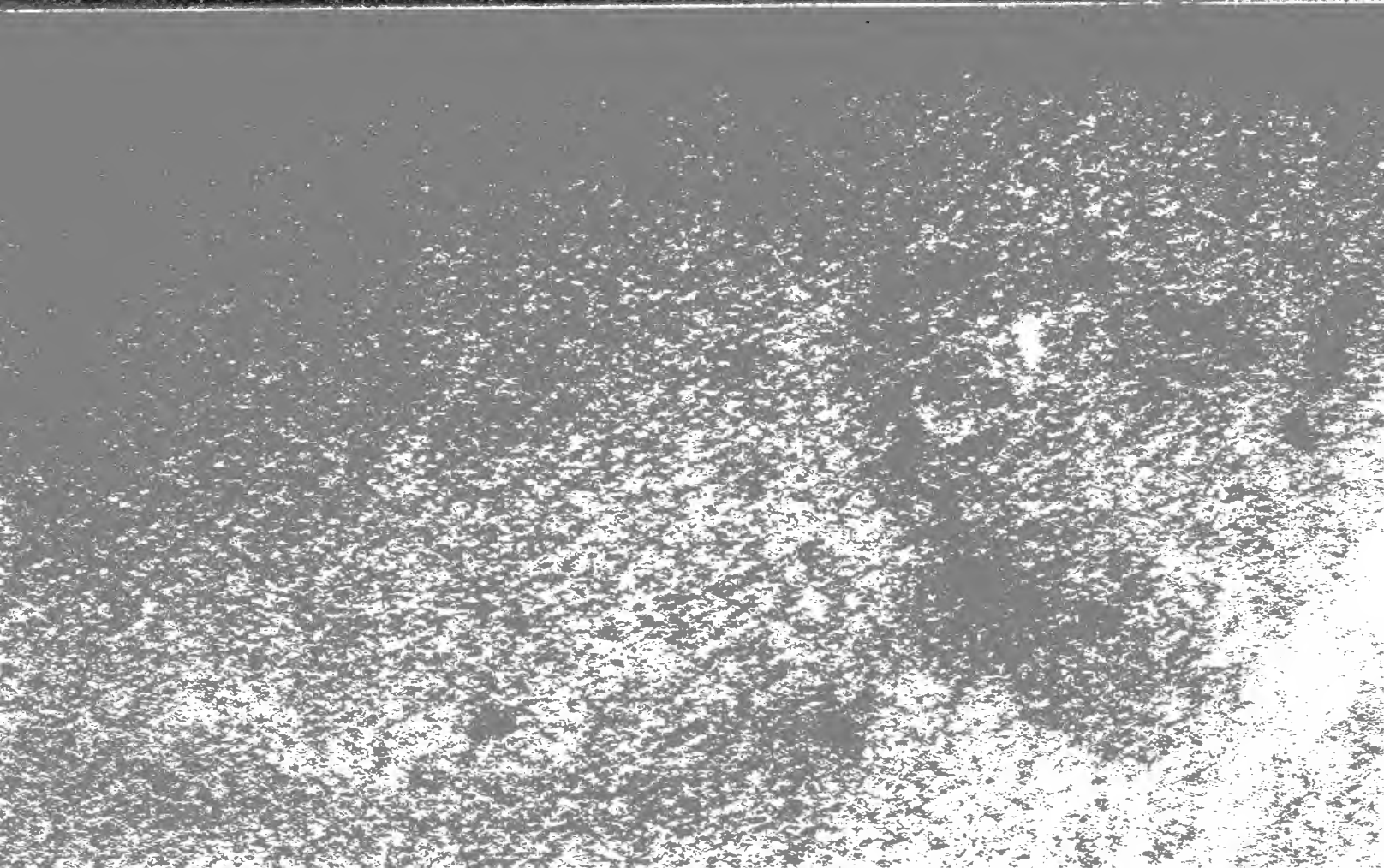
vs.

ALASKA STEAMSHIP COMPANY,
(a corporation),
Appellee.

BRIEF FOR APPELLANT.

HOWARD S. HARRINGTON,
T. CATESBY JONES,
New York,
WILLIAM DENMAN,
San Francisco,
Proctors for Appellant.

HARRINGTON, BIGHAM & ENGLAR,
New York,
DENMAN AND ARNOLD,
San Francisco,
Of Counsel.



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No. 3102

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL CARBON COMPANY,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY,
(a corporation),
Appellee.

BRIEF FOR APPELLANT.

This is an appeal from a decree of the United States District Court for the Western District of Washington, Southern Division. The case was tried before Judge Cushman. The District Court dismissed the libel.

Pleadings.

The libel sets forth the following facts:

On September 8th, 1915, the libellant shipped and placed on board the steamship "Eureka", then lying at the port of New York, 116 barrels containing dry battery cells consigned to the libellant at San Francisco and to be carried by the "Eureka" from New York to

San Francisco. On September 14th, 1915, the libellant shipped from Philadelphia an additional quantity of dry battery cells, namely, 12 boxes and 123 barrels on September 17th and 124 barrels and one box on September 16th. The goods shipped on the 14th of September were to be carried to San Francisco and there delivered to the libellants and the goods shipped on September 16th were to be carried to Los Angeles and there delivered to F. H. Murray. The "Eureka" sailed from Philadelphia, but did not arrive at San Francisco. On October 1st, the libellant heard that the Panama Canal was closed to navigation. Libellant immediately inquired of the agents of the "Eureka" at Philadelphia as to where the vessel was at that time. The agents of the "Eurkea" informed the libellant that the vessel was detained by the cause of the closing of the canal and that she was then at the port of Colon. Libellant immediately notified the agents of the "Eureka" that its goods shipped on board the "Eureka" were perishable and it offered to pay for the discharge of said goods and to pay for all costs that might be incurred by way of discharging and restowing the cargo which necessarily would be disturbed in reaching libellant's goods. The agents of the "Eureka" failed and refused to deliver the goods to the libellant. The libellant repeatedly renewed this request and demanded that the cargo be delivered at once to it. It again notified the agents of the vessel that unless a delivery was immediately made, its goods would be a total loss because of their perishable nature. Several weeks elapsed after the offers, requests and demands above mentioned were

made. In the meantime libellant was in constant communication with those in charge of the "Eureka" renewing its offers and requests but those representing the vessel still refused to make delivery of the goods. Nothing was done by those in charge of the vessel until November 22nd and 23rd when the cargo was delivered to the libellant at New Orleans, La.

As the libellant had predicted, the cargo in the meantime became very badly damaged. A suit was brought to recover the damage so sustained by the cargo.

Exceptions were filed to this libel by the Alaska Steamship Company, who appeared as claimant of the steamship "Eureka". These exceptions were subsequently amended. The exceptions were overruled by order of Judge Nederer and an answer was then filed by the Alaska Steamship Company to the libel.

In the answer it is admitted that the allegations of the libel with respect to the goods being shipped on board the "Eureka" are true, but the claimant denies any knowledge or information sufficient to form a belief as to the allegations with respect to the condition of the goods when shipped. The claimant sets up a number of facts with respect to the ownership of the "Eureka" and to the charters under which the vessel was operating, but as no proof has been adduced by the claimant to substantiate any of these allegations, it is submitted that no further attention need be paid to them. Claimant admits that the "Eureka" did not arrive at San Francisco and sets up a number of facts as a special defense.

The claimant has set up a number of clauses in the bills of lading which it contends in its answer exonerates the vessel from the performance of its voyage. The first of these clauses was the usual bill of lading clause which provides in general terms that the carrier shall have the liberty of lighterage and which further provides that if the vessel puts into a port of refuge or be prevented from proceeding on the voyage, the carrier shall have the liberty of transshipment and also releases the carrier from loss or damage occasioned by the usually specified causes, such as perils of the sea, etc. The second clause of the bill of lading relied upon as a defense provides that the carrier should not be liable for delay except as warehouseman and gives the carrier the right of transshipment.

The third clause of the bill of lading relied upon as a defense provides:

> "When the loading, transport, transshipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measure, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled to load, discharge, transship, put into warehouse or quarantine depot, or into a lighter, bulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transshipment or warehousing of Customs, including Surtaze d' Entre P'ot, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods."

The answer then alleges that, when it became apparent that the canal would probably remain closed for

some time, the owners and charterers *and their agents* endeavored to find some method of transshipping the cargo, but they were unable to arrange for transshipment. While the steamer was so detained, libellant demanded that the Oregon-California Shipping Company transship the cargo immediately and that the libellant would hold the Oregon-California Shipping Company and the owner of the steamship "Eureka" liable for any damage in the event that the steamer should be sent by the Straits of Magellan. The answer sets up that the charterers of the steamer notified the libellant on October 24th, 1915, that the vessel would be diverted to New Orleans.

As a fourth defense claimant further sets up the usual bill of lading clause which provides that the carrier should not be liable for gold, silver, precious stones, etc., and for loss or damage arising from any of the following causes, viz: fire from any cause, on land or on water, jettison, ice, freshets, floods, weather, pirates, robbers, or thieves, etc., and further that the damage to the libellant's goods was caused by the inherent defects in the goods. As a fifth defense, the claimant sets up a clause in the bill of lading which provided that claim for damage to the goods must be made before the removal of the goods.

ALL OF THE WITNESSES EXAMINED ON BEHALF OF THE LIBELLANT WERE EXAMINED BY DEPOSITION.

This court is therefore, equally as well able as the lower court to judge the facts of the case. See *Lehigh*

Valley Transportation Company v. Knickerbocker etc. Co., 212 Fed. 708, 709, where the Circuit Court of Appeals for the Second Circuit said:

> "When it comes to the question of fact, we are as well able to decide it as was the District Judge, because all the important testimony was taken by deposition."

Judge Hunt, of this Circuit, speaking for this Court in the case of *The Santa Rita,* said:

> "In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libelant's principal witnesses, who gave direct evidence thereon, testified by depositions. Upon this matter, therefore, the trial judge had not the advantage of seeing and hearing the witnesses. His position, to arrive at a true result, was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of a finding, or the written testimony relates to matters as to which the trial court is better able to reach a satisfactory conclusion than the appellate court, the finding will be adhered to, does not apply with the same force."
>
> *The Santa Rita,* 176 Fed. 890 at 893.

Facts.

Anson J. Mitchell was the traffic manager for the libellant. He entered into the contracts of carriage above mentioned with Phelps Bros. & Co. of New York and L. Rubelli's Sons of Philadelphia for the carriage of the dry battery cells from New York and Philadelphia to San Francisco and Los Angeles. When the goods were sent to New York and Philadelphia for ship-

ment, Mr. Mitchell wrote a letter to the agents of the vessel both at New York and Philadelphia:

> "I wrote them a letter enclosing the original bill of lading, giving the number of the barrels and boxes, car number, stating to whom they were consigned and the value, advising them that we had prepaid all charges to destination and asked them to send us the ocean bill of lading."
>
> (Mitchell page 13.)

See these letters, Libellant's Exhibits 7, 8 and 9.

The bills of lading referred to by Mr. Mitchell were the inland bills for the carriage of the goods from Cleveland, Ohio, where they were manufactured, to New York and Philadelphia. The National Carbon Company delivered the goods to the rail carrier at Cleveland for carriage to New York and Philadelphia where they were to be delivered to the steamship company. These goods were in good order when they left Cleveland, Ohio (Mitchell p. 15).

At one stage of the proceeding, the claimant made some point of the fact that a part of the goods were consigned to F. H. Murray at Los Angeles. It appears from Mitchell's testimony (Mitchell page 15) that Murray was the agent of the libellant and that the goods really belonged to the libellant and were only consigned to Mr. Murray in his own name for his convenience. The bill of lading issued for the goods shipped from New York to San Francisco was signed "J. U. English for Oregon-California Shipping Company" (Libellant's Exhibit 2). English was connected with Phelps Brothers & Company, the New York agents of L. Rubelli's

Sons of Philadelphia (Kurz pp. 134, 135). The freight was prepaid on this shipment. The goods which were placed on board the "Eureka" at Philadelphia were shipped under bills of lading signed "R. B. Bates for Oregon-California Shipping Company" (Libellant's Exhibits 3 and 5). Bates was an employee of L. Rubelli's Sons (Kurz p. 135).

On October 1st, 1915, Mr. Mitchell telegraphed Rubelli's Sons, asking them to inform him where the steamship "Eureka" was at that time (Mitchell pages 16 and 17) (Libellant's Exhibit 10). On October 2nd, Mr. Mitchell received a telegram from Rubelli's Sons as follows:

(Libellant's Exhibit 11.)

"Branch Telegraph Office
Cor. Madison Ave. & 117th St. N. W.
Cleveland, Ohio.

WN	Line	22P	Message
Number	Sent by	Received by	Check
16	Hr	GC.	14
Dated	Philadelphia, Pa.	Received 10/2	1915

Tampico due East San Pedro yesterday 'Eureka' last report arrived this side Cristobal twenty ninth Sept.

Rubellis Sons."

On October 8th, Mr. Mitchell hearing nothing further from either Rubelli's Sons or Phelps Brothers & Company came to New York and interviewed Phelps Brothers & Company. He then went to Philadelphia and interviewed Rubelli's Sons & Company on October 9th, 1915. At this interview Mitchell pointed out to Kurz, Davis and Bates that the goods were of a perishable nature and that he thought it would be advisable to

take the goods out of the ship. Kurz then sent for the foreman stevedore employed by Rubelli's Sons Company and the stevedore brought with him the stowage plan of the "Eureka" which showed how the goods had been stowed in the vessel. Mr. Mitchell then inquired as to what would be the approximate expense of discharging his goods from the "Eureka" at Colon. He says:

> "I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time, I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time."
>
> (Mitchell pages 19 and 20.)

Mitchell further explained why the batteries would deteriorate if kept in the ship and that it was absolutely necessary for the goods to be delivered at once. Rubelli's Sons & Company refused to deliver the goods to Mitchell. Mitchell's testimony on this point is as follows:

> "Q. Did they refuse to deliver them?
> A. They did."
>
> (Mitchell page 23.)

Mitchell testifies that he could have brought the goods back to New York and that by so doing if the goods had been delivered to him promptly at Colon that the damage to the goods would have been avoided. It appears also from his testimony that there were a number of lines of steamers operating between Colon and New York and that there would have been no difficulty in getting freight room on these ships as the only ships which were affected by the slides at Panama were the ships which were bound through the canal.

Mitchell repeated his demands, on or about October 22nd, 1915, when he again went to Philadelphia. At this time he was shown a copy of a telegram which Rubelli's Sons & Company had sent to the Oregon-California Shipping Company (Libellant's Exhibit 12) (Mitchell pages 26 and 27).

(Libellant's Exhibit 12.)

"Western Union Telegram

Charge Phila Shipping Co.
Oct. 18, 1915.

Oregon California Shipping Co.
Railway Exchange Building
Portland, Ore.

National Carbon Company insist that shipments 'Eureka' should not go via Magellan account batteries would be worthless on arrival destination Stop *They offered pay all expenses discharging including loading back on board any other goods in order to forward their goods from Colon* Stop We made them proposition our wire fourteenth which they state very satisfactory Stop To avoid heavy claims better transship cargo Wire quick.

L. Rubelli's Sons."

In the meantime, on October 14th, Mitchell had telephoned from Cleveland to Rubelli's Sons & Company at Philadelphia and renewed his demands. On October 16th he again telephoned Rubelli's Sons from Cleveland and he was informed by Davis that Rubelli's anticipated making arrangements to unload the goods at Panama. The arrangements referred to are set forth in a circular which was issued afterwards under date of October 22nd. This circular is in evidence as libellant's exhibit 14. In this circular it is said:

> "We were, as agents for the Oregon-California Shipping Company, in daily touch with the Captain of the steamer and from his first report it was hoped that the steamer could pass through the canal about October 10th."

It was on or about October 18th that Mitchell first heard that it was contemplated that the vessel might be sent by way of the Straits of Magellan (Mitchell page 39). He immediately protested:

> "Because we made a demand for the goods at Colon knowing that we could get rid of them quicker and easier after taking delivery at Colon, and also the further fact that the long voyage around by way of Magellan would naturally tend to make the batteries what we call seconds instead of first-class cells."
>
> (Mitchell page 40.)

Mitchell's testimony as to what occurred at the interview at Philadelphia on October 22nd is as follows:

> "Q. Did they agree to give you any delivery at Colon?
>
> A. They would not.

Q. Did they refuse?
A. They stated they could not.
Q. Did they state why they could not?
A. They stated they had put the matter up to their people at Portland and they could not get them to agree. They thought my proposition was more than fair."

(Mitchell page 43.)

Kurz confirms Mitchell's account of what took place at the interview (Kurz p. 145). About November 1st, Kurz of Rubelli's Sons & Company apparently despairing of getting the Oregon-California Shipping Company to do anything towards the relief of the situation, decided to go to Portland, Oregon. He says:

"My trip was for the purpose of getting some definite action, as the shippers were after us for information as to what was going to be done, and I didn't care whether I was helping the Oregon-California Shipping Co. or anyone else, all I was interested in was getting that cargo to its destination."

(Kurz page 149.)

After Kurz arrived at Portland, Oregon, and, after he had conferred with the Oregon-California Shipping Company, he sent a number of cables to the master of the "Eureka" (see Libellant's Exhibits 71, 72, 73 and 74). One of these cables is quoted by the District Judge in his opinion. The vessel did proceed to New Orleans in response to these orders. When Mr. Mitchell learned that the vessel was going to New Orleans, he immediately went there and was there when the vessel arrived. This was on or about November 22nd, 23rd, 1915 (Mitchell page 49). He met Kurz and Williams, the general manager of the Oregon-California Shipping

Company at New Orleans. When the cargo was taken out of the ship, Mitchell found that a number of the barrels were broken open. He made tests of the cells and he found that they had been very badly damaged as a result of their being in the ship for such a long period of time (Mitchell pages 49 and 50). He says:

> "The batteries showed that they had been subjected as far as I could distinguish, to extreme heat, I presume that we could offer more of a scientific reason why, by our chemist, whom I can bring over here, but to my mind, and I have inspected hundreds of shipments, the batteries were not what we would term first class. A great number of them that I tested I found the amperage running lower than what they should, and also the seal on the cell showed the imprints of the straw, which tended to show, of course, that the heat had been excessive, and naturally began to melt the wax."
>
> (Mitchell page 50.)

Mitchell at once notified Mr. Williams, the general manager of the Oregon-California Shipping Company, in person that the libellant would claim damages for the injury to its goods (Mitchell page 56). Mitchell also served Williams with a letter thus making claim in writing.

The goods were then shipped to the New Jersey plant of the libellant where they were examined by chemists. These chemists testified that the cells had been badly damaged by heat. See the testimony of Edwin J. Wilson and William A. Richey.

Captain Francis G. Coxon, an expert witness examined by the libellant, testified that the heat in a ship's

hold while she is lying at rest would be in excess of the heat prevailing at the time the ship was under way.

On these facts the District Judge held that the "Eureka" was not responsible for the libellant's damages, because the demand which Mitchell had made for the delivery of the goods had been made upon Kurz and not upon the Oregon-California Shipping Company. It is submitted that the court erred in so holding.

Point I.

LIBELLANT'S RIGHT OF RECOVERY WAS BASED UPON THE REFUSAL OF THE AGENTS OF THE STEAMSHIP "EUREKA" AT PHILADELPHIA TO RESPOND TO THE DEMAND MADE THEM BY MITCHELL AT PHILADELPHIA.

As long ago as the case of *The Martha,* 35 Fed. Rep. 313, it was held that such a state of facts as we have proved in this case makes out a case for the libellant. In *The Martha* case the facts were as follows:

On September 17th, 1884, the S. S. "Martha" left Havre, France, bound for New York, with a general cargo on board. A part of the cargo consisted of one hundred and twenty-five (125) barrels of crude glycerine, consigned to a firm in New York. When the ship was a few days out from Havre her machinery broke down and she was compelled to make the port of Halifax. Before reaching Halifax another accident occurred which rendered her machinery useless and she was finally towed into Halifax, arriving there the first

of October. On examination is was found that to repair her machinery certain parts of the engine would have to be ordered from Europe. This detained the steamer in Halifax until the 14th of February, 1885, when she sailed for New York, arriving at New York on the 17th of February, 1885.

As soon as the probability of long detention of the steamer became known to the consignee of the glycerine, he applied to the owners of the steamer through her *agent in New York*, for delivery to him of the glycerine in Halifax and offered to pay the full freight under the bill of lading, together with all his incidental expenses. The shipowner refused to make delivery and the libellant thereupon notified *the ship's agent* in New York that he would hold the ship for any damages that might be sustained by the detention of the glycerine. After the ship arrived in New York it was found that a number of the barrels of glycerine were entirely empty and that the glycerine had leaked out and that the barrels had deteriorated because of the delay in delivery.

The court said:

> "The demand for a delivery of the glycerine in Halifax, accompanied with a tender of payment of full freight together with all incidental expenses, and an average bond is testified to by the consignee who made the tender and by the agent of the ship through whom it was made. Against this testimony there is nothing and I see no reason upon which to reject the evidence. The fact being found that the vessel, in October put into Halifax, a port of distress, in need of repairs, that were not to be completed until the following February, that the consignee of the merchandise offered to take it

> in Halifax and pay all the freight provided for in the bill of lading, together with all the expenses incident thereto and to sign an average bond; and that the shipowner without reasonable excuse, refused to make such delivery but on the contract held the goods in the ship until her arrival at the port of New York,—the liability of the ship for all damages caused to the libellant by reason of the detention seems clear." (35 Fed. at 314.)

In the present case all of the freight had been *prepaid,* hence there was no need to offer to pay the freight. The vessel was not at a port of refuge, hence there was no general average. Mr. Mitchell offered to pay all the expense of discharging his goods, including the expense of unloading and reloading other cargo which had to be disturbed to get at his goods.

Mr. Kurz, the "Eureka's" agent at Philadelphia, supports Mr. Mitchell in his testimony on every point, just as the ship's agent in *The Martha* case supported the consignee in that case.

Furthermore, Mr. Mitchell's testimony is supported by documentary evidence and it has not been rebutted by testimony offered by the claimant, although the claimant had abundant opportunity to obtain testimony, as the case has now been pending for almost a year.

Point II.

THE EXCEPTIONS CONTAINED IN THE BILL OF LADING DO NOT AID THE CLAIMANT.

When the claimant filed its answer it set up as a defense certain clauses in the bill of lading exempting

the ship-owner for *delay*. It is to be borne in mind, however, that the libellant is not suing for damages for delay, but is claiming damages for refusal of the steamship owner to deliver his goods to him at Colon when demanded. It is clear, therefore, that the bill of lading clauses had nothing to do with this phase of the case.

The claimant also sets up the exception contained in the bill of lading which relieves the carrier from responsibility for the *deterioration* of the goods. It is believed that the claimant cannot be serious in this contention. Of course if the claimant had no notice of the character of libellant's goods and they should suffer because of their perishable nature, claimant would not be liable, exception or no exception, as the law reads such an exception into all contracts of affreightment. But where claimant is informed of the perishable nature of the goods, this imposes upon it, as a carrier, the duty to take such care of the goods as their perishable nature requires. And no exception which relieves the carrier of this responsibility is valid.

In the case of *Swift v. Furness Withy*, 87 Fed. Rep. 345, the syllabus is as follows:

> "When perishable goods are shipped, and the carrier is to receive adequate pay, no construction of the contract is admissible which will permit the carrier, arbitrarily, and without reason or necessity, to deprive the shipper of the benefit resulting from such shipment."

In that case the ship deviated from her voyage and the court held the carrier liable. With respect to certain exemptions contained in the bill of lading the court quoted the following language of *Liverpool, etc. Co. v. Phenix Ins. Co.,* 129 U. S. 397:

> "The law does not allow a public carrier to abandon altogether his obligations to the public and to stipulate exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

In rendering the judgment in the case the court said:

> "I find as facts that, but for the return to Havre the beef would have been delivered on October 23rd and that the libellants used due diligence to reduce the damages and to care for the beef during the detention. The libellants are entitled to decree for the deterioration and for any fall in the market price after October 23rd and a reference may be taken to determine the amount of the damage."
>
> *Swift v. Furness Withy,* 87 Fed. at 348-349.

This case was referred to with approval, by Judge Hough, in the case of *The Citta di Mesina,* 169 Fed. Rep. 472.

In the present case the claimant has introduced no evidence whatever to show that the ship was seaworthy or that it exercised due diligence in making the ship seaworthy. Hence, even though the Harter Act applies—and we do not see how it could apply—the shipowner cannot claim the benefit of the Harter Act.

In the case of *The Wildcroft,* 201 U. S. 378, 398, the Supreme Court of the United States said:

> "In order to have the benefit of the exemptions provided in the Harter Act, 27 Stat. 445, against errors of management or navigation by reason of the third section, which was relied upon in the case, it was incumbent upon the ship-owner to prove that the vessel was seaworthy at the time of beginning the voyage, or that due diligence has been used to make her so. *International Navigation Company v. Farr & Bailey Manufacturing Company,* 181 U. S. 218; *The Southwark,* 191 U. S. 1".

When the ship-owner through its agents was informed of the perishable nature of libellant's goods, it became its duty either to deliver the goods to the libellant when demanded or to take such care of the goods as their nature demanded. It did neither. None of the exceptions in the bill of lading in any way justify the carrier for his failure to deliver the goods when a proper demand has been made as was done in this case. It would be carrying the doctrine of the inseverability of cargo and ship during a voyage to ridiculous lengths to say that an owner of goods could not have possession of them when he offers to pay every conceivable expense in connection with taking them out of the ship.

Point III.

L. RUBELLI'S SONS WERE IN FACT THE EASTERN AGENTS FOR THE OREGON-CALIFORNIA SHIPPING COMPANY.

In the statement of facts, we have pointed out that the bills of lading were signed by employees and agents

of L. Rubelli's Sons & Company. In addition to this documentary evidence showing that the contract of carriage was made by Rubelli's on behalf of the ship, we have the following additional documentary proof: the letter of L. Rubelli's Sons, dated October 22nd, in which Rubelli's says:

> "We were, as agents for the Oregon-California Shipping Co., Inc., of Portland, Oregon, in daily touch with the captain of the steamer (S. S. 'Eureka')."
>
> (Libellant's Exhibit 14.)

In a letter of October 8th, 1915, addressed to President Wilson, Rubelli's says:

> "We have just recently inaugurated our service between Philadelphia and the West Coast of the United States, and our S. S. 'Eureka,' the second steamer of this line, is now held up on the Eastern end of the Canal awaiting passage."
>
> (Libellant's Exhibit 48.)

The following telegrams were exchanged between Rubelli's Sons & Company and the Oregon-California Shipping Company:

> "Postal-Telegraph Commercial Cables Telegram
> 105 Dock Street, Phila.
> Phone, Lombard 4087.
>
> 41p jk. 'JEJ' 114 oAM
> Portland Oregon-Oct-4-15.
> L. Rubellis Sons,
> Phila Pa.
> We think imperative to either return 'Eureka' to Phila and unload to put in trade New York or Phila to Florida coast or Cuban sugar trade can't you get firm offers time charter basis or offer firm

freights stop what about going from Canal to Havana unload then take on sugar to Atlantic ports or pulp from Florida wire fully as we must decide quickly on something.

Oregon Calif. Shipping Co."

"Night Lettergram

Received at
1420 So. Penn. Square,
Phila. Pa. Delivery No. 570.

W 35 ON Y5 4 NL 1254 A
Portland Ore Oct. 5-15
L. Rubellis Sons
Pier 16 S Dela Ave Phila

Do not make arrangements to transfer 'Eureka' cargo as owners will not permit us to place ship on Atlantic trade stop our best legal talents pronounce slides act of God and state we are exempt from payment during detention what is your opinion see section three Act of Congress Feby thirteenth eighteen ninety three.

Oregon Calif Shipping Co."

"Night Letter
The Western Union Telegraph Company
charge
Philadelphia Oct. 9, 1915.

Oregon California Shipping Co.
Railway Exchange Bldg.,
Portland, Ore.

Cant you arrange transship 'Tampico' Portland cargo from Frisco then load up 'Tampico' with a cargo for Philadelphia or New York running down to Salino Cruz transferring over Tehauntepec Railroad to Puerto Mexico loading on 'Eureka' stop 'Eureka' could discharge her cargo Puerto Mexico send over to Salino Cruz and load on Tampico stop this suggestion made as latest report Canal may be closed till end year stop think could keep both

steamers busy that way till canal again opened stop you should be careful in making arrangements with Crosett or owners protect your interests being guided by our last wires stop think imperative make some arrangement to minimize loss to all concerned shippers also very anxious telegraph fully stop might be able arrange use Panama Railroad.

L. Rubelli's Sons,
CK."

"Postal Telegraph-Cable Company
Night Lettergram

1420 So. Penn Sqr., Phila. Pa.

A-42-NY Y 83-N. L., 332-A:M.

Portland, Oregon Oct. 11-15.

L. Rubelli's Sons

Pier 16 South Delaware Ave., Phila; Pa.

Yours date We are advised Crossett Western Lumber Co. something must be done with 'Eureka' account canal blocked.

Try your best secure offer time charter government form 'Eureka' say thirty days with option longer if canal continues closed using West Indies Florida Coast and Atlantic including Cuba stop. If you get direct offer overseas trade submit same stop What can you do on coal sugar and beet pulp stop our idea to unload at Colon and hold wire your opinion quickly.

Oregon-Calif' Shipping Co."

"Postal Telegraph-Cable Company
Night Lettergram

7 PJK 52 NL 736 AM

Portland Ogn Oct. 22-15.

L. Rubellis Sons

Phila Pa.

Idea Crossett Western run Eureka to New Orleans transfer to rail account absolutely unable to get ships on Pacific to handle and fearing suit account

delay stop can Kurz attend transfer prorating cost of ship to date on expense bills stop this seems only way to get goods to destination promptly answer.

Oregon California Shipping Co."

And in a letter dated October 16th, 1915, addressed to Rubelli's Sons & Company by the Oregon-California Shipping Company, Inc., it is said:

"So we will only ask you to help us bring about a solution of the matter. Should we discharge this cargo at Colon under the present conditions, it would possibly serve to relax the energies of the Crossett Western Lumber Co. and we do not care to take it upon ourselves to be responsible without any chance of gain when the Crossett Western Lumber Company is holding the bag."

It appears as has been stated by us in the statement of facts in the earlier part of this brief that all of the cablegrams which were sent to the master of the "Eureka" at Colon were signed by Kurz of L. Rubelli's Sons & Company at Philadelphia. One of these cables is quoted by the District Judge in his opinion (opinion page 73). The District Judge in his opinion says:

"The following telegram was thereafter sent the captain from Portland, on November 4th:

'Baggott, Colon:

Sail tomorrow morning to New Orleans. We will be there on arrival when are you due at destination. Keep destination strictly confidential. Telegraph us your sailing.

California Shipping Co.,

Kurz.

Charge Oregon-California Shipping Co.'

The Captain thereupon proceeded with the 'Eureka' to New Orleans, where the ship was met by

Mr. Kurz, manager of L. Rubelli's Sons, and Mr. Williams, general manager of the Oregon-California Shipping Co.

This telegram I interpret as from both the Oregon-California Shipping Co. and Mr. Kurz, as the representative of L. Rubelli's Sons. It will be noted in the signature that Kurz does not sign after the name of the company, Oregon-California Shipping Co., as would ordinarily be done if he was telegraphing on its behalf or as its agent. The telegram says 'we will be there' (New Orleans); that is, Kurz, as the representative of L. Rubelli's Sons and a representative of the Oregon-California Shipping Co. (Mr. Williams)."

The District Judge curiously has misread the exhibit 74, which he quotes in his opinion. The exhibit as introduced in evidence is as follows:

"Western Union Cablegram

Time filed
10:20 P. M.

Portland, Ore, November 4, 1915.

Bagott
Colon
Sbottassi Umypaentza Uvkpoiflun Umbegidkip
Herippidas Keepivseg Faultag Schlankweg

Kurz

Sail tomorrow morning at New Orleans. We will be there on arrival when are you due at destination keep destination strictly confidential telegraph us your sailing.

Charge Oregon California Shipping Co."

It is to be noted that the cable in code as sent to the master of the "Eureka" was signed by Kurz only. The decoded message kept as a copy for reference instructs the Telegraph Company to charge the expense

of sending cable to the Oregon California Shipping Company. Kurz admits that his name was signed to the cablegrams instead of the name of the Oregon California Shipping Company, Inc. He says:

> "My name was only signed to those cables because I started to cable the captain. He knew my name; I don't know whether he would know Mr. Williams' name."
>
> (Kurz, page 151.)

After receiving the cable referred to, the master of the "Eureka" proceeded with his vessel to New Orleans, pursuant to orders received from Kurz. If Kurz had been an agent only for the purpose of soliciting freight, would he have done so?

It is apparent from reading the various cables which passed between the parties, that the master of the "Eureka" had been taking all of his orders from Kurz. Kurz apparently had so much to do with the steamship "Eureka" that he was the only superior who was known to the master of the "Eureka." The other persons connected with the "Eureka" had so little to do with the vessel that there was considerable doubt that her master would recognize instructions received from them if they had signed communications addressed to him. Are these facts compatible with the theory that Kurz was an agent merely for soliciting freight? Third persons dealing with Kurz had the right to rely on his apparent authority. Kurz cannot at a later stage in the proceedings, say that his authority was limited to soliciting freight. When the Oregon-California Shipping Company, Inc., permitted Kurz to send all messages to the master of the "Eureka" and to direct her

movements, it is submitted that they clothed Kurz with apparent authority to look after the vessel.

The District Judge in the course of his opinion said:

> "While L. Rubelli's Sons may have ceased to legally represent the shippers at the time of this trouble yet, from the situation, it is clear that that firm might be a factor in the control of the good will of such shippers, as well as assist in finding another cargo in New Orleans for the 'Eureka.' "
>
> (Opinion pages 73 and 74.)

There is no evidence in the record whatever that L. Rubelli's Sons & Company were ever the agents of the shippers. Indeed there is no such suggestion made by any of the witnesses or in any of the documents which have been put in evidence.

It is shown from the telegrams which passed between the Oregon-California Shipping Company, Inc., and Rubelli's Sons that the Oregon-California Shipping Company were urging Rubelli's to do all that they could to relieve the situation brought about by the detention of the steamship "Eureka" at Colon. If Rubelli's had nothing to do with the management of the ship and were merely agents for soliciting freight, it is hardly likely that such telegrams would be addressed to them.

Moreover, so far as we can see it, as the bills of lading were signed by employees and agents of Rubelli's and the goods were received on board on the faith of such bills of lading, such a fact is more conclusive as to the relationship between Rubelli's Sons & Company and the Oregon-California Shipping Company, than any oral testimony of Kurz.

Kurz in his testimony was obviously attempting to keep on good terms with both parties to this controversy and it will appear from reading his testimony that he was obviously unwilling to testify to more than he was compelled to admit from written documents.

On this question of agency, there are a number of allegations made in the answer which are unlikely. In the answer it is alleged that the Oregon-California Shipping Company, Inc., issued a bill of lading to the libellant. This allegation is repeated from time to time. The answer, therefore, admits that the bills of lading were lawfully issued, as the bills of lading were signed by employees and agents of Rubelli's Sons & Company. The following allegation also appears in the answer:

> "That when it became apparent that the said canal would probably remain closed for some time the owners and charterers of the said steamship *'Eureka' and their agents*, endeavored to find some method of transshipping the cargo."
>
> (Answer, Apostles page 41.)

The same allegation is repeated in article eight of the answer on page 43 of the Apostles.

It appears from the evidence that the only persons who exercised themselves to transship this cargo were the Crossett Western Lumber Company, Williams and Kurz.

The court below was of opinion that unless the libellant was able to show that Rubelli's Sons & Company were the general agents of the steamship "Eureka," the demand made by Mitchell upon Kurz was not a sufficient demand for the return of his goods. It is

submitted that the court below erred in so holding. Kurz was directing the movements of the "Eureka" and whether or not he had the authority of general agency for all business of the Oregon-California Shipping Company, Inc., is immaterial. He was authorized by the Oregon-California Shipping Company to deal with the steamship "Eureka."

Our adversary suggested further that demand should have been made on the master of the "Eureka" at Colon. Would it not have been futile to make a demand on the master when the master would have referred the demand back to Kurz?

Point IV.

CLAIMANT HAS INTRODUCED NO PROOF TO SHOW THAT IT WAS IMPOSSIBLE TO DELIVER LIBELLANT'S GOODS WHEN THEY WERE DEMANDED.

Although libellant had prepaid the entire freight and was willing, in order to get its goods, to pay for the discharge of that part of the cargo which might have to be moved to get at libellant's goods and also pay for the reloading of such cargo, Kurz refused to deliver libellant's goods. Kurz admits that libellant made the proposition, but offers no excuse for his failure to comply with the demand. It has been suggested in the claimant's brief that the cargo could not have been discharged. Kurz has made no such claim. We believe that, if such were the fact claimant would have had no difficulty in establishing the fact. It has not, however, called a single witness for that purpose. The

suggestion that a quantity of other cargo would have to be disturbed in order to reach the libellant's goods, does not affect the case as libellant offered to pay the entire expense.

It has also been suggested that there was no place at Panama where the cargo could be landed. This is not proved, nor do we believe it to be the fact. Cargo intended for transshipment across the Isthmus could not be landed, but there is no proof that cargo could not be taken out of the ship temporarily to permit restowing. Moreover, the cargo would not have to be discharged. To take out libellant's goods it was only necessary to break out one hold. The cargo could have been easily placed on deck for the short time required to get at libellant's goods.

It has also been suggested by claimant's advocate that it would have done libellant no good to have its cargo. This is hardly a question for claimant to decide. Yet we have shown that it would have been of great benefit for Mr. Mitchell knew that he could take care of the cargo at Colon.

He says:

> "Q. Did you object to your goods going by way of the Straits of Magellan? A. I did.
>
> Q. Why did you do that, for what reason did you object to your goods going that way?
>
> A. Because we made demand for the goods at Colon knowing that we could get rid of them quicker and easier after taking delivery at Colon, and also the further fact that the long voyage around by way of Magellan would naturally tend to make the batteries what we call seconds instead of first class cells."
>
> (Mitchell, pp. 39-40.)

Mr. Mitchell further says:

> "A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama-Pacific Line, the Panama Steamship Company, the American Hawaiian Company and also the Luckenbach people, and *they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.*"
>
> (Mitchell, p. 185.)

As all of the companies mentioned by Mr. Mitchell were regularly operating steamers from Colon to New York and were general cargo carriers, there can be no question but that the National Carbon Company could have made arrangements with these various carriers to have brought their goods back to New York. The suggestion that because the claimant could make no arrangement for the transshipment of the entire cargo; therefore the libellant could not is a *non-sequitur*. It is quite a different thing for a large company, such as the National Carbon Company, to obtain room for three comparatively small shipments of goods totaling three hundred and forty-eight (348) barrels, than for a Steamship Company to make an arrangement for the transshipment of an entire cargo with a rival company. Naturally the rival carrier would desire to accommodate such a shipper as the National Carbon Company for the sake of future business; whereas its attitude toward the claimant would be to give no assistance to a rival in distress.

It is to be further noted that the libellant had similar goods on another steamer which was held up by the Panama slide. This steamer put back to New York and there delivered libellant's goods without damage.

Point V.

THE DELAY OF THE STEAMER AT COLON WAS UNWARRANTED.

It is well settled that a vessel with perishable cargo on board is responsible for damage caused by unwarranted delay:

The Queen, 28 Fed. Rep. 755;
The Coventina, 52 Fed. Rep. 156;
Schwarzschild v. National Steamship Co., 74 Fed. 257;
Propeller Niagara, 21 How. 7;
The Gutenfels, 170 Fed. Rep. 937.

In *The Coventina*, the court said:

> "So here, when it was found that this ship had been seized and could not be released, except at great risk to the owners, until the end of an uncertain litigation, *reasonable consideration of the shipper's interests required either that the goods should be transshipped to their destination by some other vessel, or else that the shipper should be notified of the liability to delay, and the privilege given him to reship at his option. In default of this the ship took on herself the risk of loss by delay,* with the right of recourse to the charterers for indemnity."

The Supreme Court, in *Propeller Niagara* (21 How. 7) said (p. 27):

> "Safe custody is as much the duty of the carrier as conveyance and delivery, and when he is unable to carry the goods forward to their place of destination from causes which he did not produce and over which he had no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel in King v. Sheperd, 3 Story (C. C.) 358, to maintain the proposition assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction this doctrine and held that his obligation, liabilities and duties as a common carrier still continued and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract as universally understood in the courts of justice."

See also, *The Maggie Hammond*, 9 Wall. 435.

As early as October 12th (Libellant's Exhibit "59"), the steamship company was informed by Rubelli's that the canal would not be open on November 1st, and that it was impossible to say when it would be opened. After that time telegram after telegram was sent it urging that something be done with the steamer and her cargo. No orders were given to the master of the "Eureka" to

proceed until November 4th (Libellant's Exhibit "54"). The only excuse for this delay is contained in Libellant's Exhibit "47," a telegram from Oregon-California Shipping Co., Inc., addressed to Rubelli. That telegram is as follows:

> "*Do not make arrangements to transfer Eureka cargo as owners will not permit us to place ship on Atlantic trade* stop. Our best legal talents pronounce slides act of God and state we are exempt from payment during detention what is your opinion see section three Act of Congress February thirteenth, eighteen ninety three."

As was said by the court, in the case of *The Coventina,* 52 Fed. Rep. 150 cited above, the owner of the cargo was not interested in the dispute between charterer and owner as to the trade in which the ship should be used. The ship was bound to the goods to fulfill her contract of affreightment. Knowing as they did the character of the cargo (and the Oregon-California Shipping Co., Inc., knew this as well as Kurz. See National Carbon Company's telegram of October 18th to Oregon-California Shipping Co., Inc., informing it of the perishable nature of the cargo) it was the duty of the Oregon-California Shipping Co., Inc., to either deliver the cargo *at once* to the National Carbon Company in accordance with its demand, or to bring the ship to some port where proper transshipment arrangement could be made. It certainly had no right to delay until November 4th before making a decision merely because the owners of the vessel would not permit her to be used in the Atlantic trade. It should have discharged the cargo at

once at Colon or it should have brought the steamer forthwith to some American port where the cargo could be discharged.

The court will observe from an examination of Libellant's Exhibits 45 and 46, that respondents knew as early as October 5th, that no arrangement could be made for the transshipment at Panama. Under these circumstances, what possible excuse can there be for waiting a full month at Panama, before making the decision to bring the vessel to New Orleans?

The claimant takes the position that the libellant is not entitled to recover damages because the delay in delivery after libellant's demand for delivery at Colon, was expressly exempted by the bill of lading.

The cases which we have cited above show conclusively that the bill of lading exemption does not refer to such a delay. The only delay which a carrier can legally exempt himself from is an unavoidable delay. The delay in delivery of the goods was not unavoidable, but was for the purpose to permit the owners and charterers to come to some decision as to the future use of the vessel. The telegrams passing between the California-Oregon Shipping Co., Inc., and Rubelli establish this fact. Should libellant suffer because of the delay in reaching a decision?

The claimant further says that the damage was not the natural and proximate cause of the refusal to deliver. The testimony of the libellant conclusively shows that it was. This testimony has not been rebutted.

It is obvious that the cargo at Colon was damaged by heat. Libellant's witnesses have testified that the longer

the vessel remained at Colon the worse the heat in the holds became. Obviously toward the end of the time the vessel was lying at Panama the deterioration from heat became a real danger. If the vessel had left Colon when it was known that the cargo could not be transshipped, libellant's witnesses testify that there would have been no damage.

The case of the *St. Quentin*, cited by our opponents in the court below, refers to an entirely different state of facts. That was not a case of refusal to deliver cargo on demand. It was a case of damage to cargo caused by heat while the ship was proceeding on her voyage through the Red Sea. In the present case the vessel was at rest (see Coxon's testimony as to the increase of heat in a ship's hold while she is at rest). There was no unwarranted delay in the *St. Quentin* case. An unwarranted delay constitutes a deviation (*The Indrapura,* 171 Fed. 929, 932). In cases of deviation a carrier is not entitled to the benefit of bill of lading provisions (*Globe Nav. Co. v. Russ Lumber & Mill Co.,* 167 Fed. 228).

It is respectfully submitted that the decree of the District Court should be reversed with costs.

Respectfully submitted,

HOWARD S. HARRINGTON,
T. CATESBY JONES,
WILLIAM DENMAN,
Proctors for Appellant.

HARRINGTON, BIGHAM & ENGLAR,
DENMAN AND ARNOLD,
Of Counsel.

No. 3102

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL CARBON COMPANY, a corporation,

Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a corporation, Claimant of the Steamship "EUREKA," her engines, boilers, tackle, apparel, furniture, etc.,

Appellee.

BRIEF OF APPELLEE.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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Metropolitan Press, Portland, Oregon

No. 3102

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL CARBON COMPANY, a corporation,

Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a corporation, Claimant of the Steamship "EUREKA," her engines, boilers, tackle, apparel, furniture, etc.,

Appellee.

STATEMENT OF FACTS.

In the months of September, October and November, 1915, the Steamship "Eureka" was chartered to carry cargo between the ports of New York and San Francisco, and intermediate ports. The charter of the steamship prescribed the Panama Canal route.

During the above period of time, the Steamship Eureka was owned by the Pacific Coast Steamship Company. The Pacific Coast Steamship Company chartered the vessel to the Crosset Western Lumber Company. The Crossett Western Lumber Company sub-chartered the vessel to the H. M. Williams Company. The H. M. Williams Company in turn sub-

chartered the vessel to the Oregon-California Shipping Company.

The vessel is now owned by the Alaska Steamship Company.

On the 8th, the 14th and the 16th days of September, 1915, the National Carbon Company placed on board the Steamship "Eureka" certain shipments of dry cells.

The shipments of September 8th and 14th were loaded at the port of New York, and were consigned to the National Carbon Company at San Francisco, California. The shipment of September 16th was loaded at the port of Philadelphia and consigned to F. H. Murray at Los Angeles, California.

Mr. Murray was the local agent of the National Carbon Company at Los Angeles.

The steamship started on her voyage, and reached the Atlantic entrance to the Panama Canal on Septemper 28th, 1915. Immediately after her arrival, the Captain ascertained that slides had taken place in the Canal, which slides were of sufficient magnitude to temporarily impede the passage of vessels through the Canal.

The National Carbon Company, together with other shippers, had negotiated for space on the vessel through the firm of L. Rubelli's Sons, who were brokers. For this reason, the Captain immediately cabled to L. Rubelli's Sons, advising them of the con-

ditions which confronted him upon his arrival at the Atlantic entrance to the Panama Canal, in order that they might in turn advise the various shippers regarding the impediments to the progress of the voyage.

As soon as it was ascertained that the "Eureka" would be delayed at the Atlantic entrance to the Panama Canal, the Master made daily efforts to ascertain the probable length of time which would elapse before the reopening of the Canal. The officers of the United States Government gave out advices from day to day which led the Master to believe that reasonable progress was being made in the removal of the slides, and that the Canal might be reopened within a comparatively short time.

These very unusual conditions demanded of the ship's Captain the exercise of that extraordinary discretion which is, by the maritime law, vested in the Master of a ship.

The Panama Canal had been opened only a short period of time. It was a new and unknown waterway. There existed no past experience concerning its navigation. Water highways, whether inland or otherwise, have a nautical history, which is founded on the experience of navigators from time immemorial. This waterway had no history.

When mariners are sailing over courses which have a history, they are able to base their judgment and the required exercise of discretion which flows therefrom, upon the experiences of the past. They

are able to determine the probable length of time that temporary impediments may last, upon the basis of their previous occurrences.

No slides have ever before occurred in the Panama Canal, because there had been no Panama Canal known to the world's history. There was, therefore, no previous experience upon the basis of which the Master of the ship could determine the probable length of time which would be required for removing the slides. For all the Master knew, the slides might be removed within a very few days and the obstacles to the progress of his voyage thereby obviated.

The fact remained, however, that he could not proceed on his course. He had contracted to carry the cargo by the way of the Panama Canal route.

The anticipated advantages of this route were the very basis of the charter under which the steamship was operating. Shippers contemplated that the reduction in the amount of time necessary to ship goods by water from the Atlantic to the Pacific Coast by the way of the Panama Canal would be of great advantage in shipping perishable cargo. The long voyage by the way of the Straits of Magellan was of great disadvantage in shipping perishable cargo.

The Captain, as a master mariner, was supposed to have full knowledge of all these facts, and was, therefore, compelled to take them into consideration before exercising his discretion.

As Master of the ship, he owed a duty not only to the National Carbon Company, but to all of the other shippers who had cargo upon the boat. He owned a duty to the owner of the boat. He owed a duty to the charterer of the boat. He owed a duty to everyone having an interest in this particular voyage.

He was, therefore, compelled to form a judgment and exercise a discretion which would be for the benefit of all these conflicting interests.

He could not very well reverse his course and return to the ports of shipment, because if he had done so, the slides might have been removed and the Canal might have been reopened while he was returning. If such an event had happened while he was returning, then everyone having an interest in the voyage could well have complained that the Captain had not exercised a sound judgment, and had abused his discretion.

He could not have turned to any neighboring port and transhipped the cargo, because there was no such neighboring port, and if there had been such a port to which he could have turned, he would still have been confronted with the possibility that the Canal might reopen, and in such an event he would have been held guilty of exercising a poor judgment, and charged with the abuse of discretion.

He could not have continued his voyage by the way of the Straits of Magellan, because the avoid-

ance of this course was the very purpose of the shipment by the way of the Panama Canal route.

It further developed that the "Eureka" was an oil burner, and sufficient fuel could not be obtained to take her by the way of the Straits of Magellan.

In addition to all this, the original charter prescribed that the "Eureka" was to sail "via the Panama Canal, only," and, therefore, such an attempt would have been not only a violation of the provisions of the bill of lading, but likewise a violation of the original charter. The Captain, therefore, deemed it advisable to wait for a reasonable period of time to see if more definite information regarding the reopening of the Panama Canal could not be obtained from the United States Government.

This perplexing state of affairs continued until October 15th, 1915, at which time the Master again advised L. Rubelli's Sons that it was "impossible to obtain definite information" as to the reopening of the Canal, but that in all probability the same would not be reopened before January 1st, 1916.

The bills of lading, evidencing the shipments of the National Carbon Company on the Steamship "Eureka" contained provisions to the effect that if the steamer should be prevented, by any cause, from proceeding in the ordinary course of her voyage, the goods were to be transhipped to their destination at the expense of the shipper, and that the carrier should not be liable for loss or damage occasioned by causes beyond its control.

As soon as it was ascertained that the probability of the reopening the Canal was somewhat remote, the Master and the owner made every possible effort to tranship the goods across the Isthmus of Panama and forward them by water from the Pacific entrance to the Panama Canal to the points of destination on the Pacific Coast.

Several obstacles arose in the path of the efforts which were made to accomplish a transhipment across the Isthmus of Panama.

The United States Government forbade the discharge of any cargo at Colon unless the ship so discharging would guarantee to immediately tranship, across the Isthmus, the cargo discharged, and to immediately tranship the same from the Pacific entrance of the Canal to the points of destination. Railway accommodations across the Isthmus could not be obtained. Boats were scarce. It was found impossible to obtain any ships or space upon the Pacific seaboard. The unsettled conditions in Mexico made it impossible to obtain railway accommodations from the Isthmus of Tehuantepec up the Pacific Coast. Efforts were made to procure a transhipment of the goods over several different lines of carriers, and all such efforts failed.

Beginning on the 15th day of October, 1915, when the Master was advised that no definite information could be obtained as to the probable date of the reopening of the Canal, the firm of L. Rubelli's Sons, the Oregon-California Shipping Company, the charterers, and the Master, made a thorough investiga-

tion of all practical methods of dispatching the boat or cargo to the points of destination. As already stated, they made efforts to tranship across the Isthmus of Panama and up the Pacific Coast by other carriers.

They interviewed, amongst others, the Duluth Steamship Company, Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic and Pacific Transportation Company, the Luckenbach Company, the Panama Pacific Line of New York, the owners of the Edison Line at Boston, the Alaska Steamship Company and Olson & Mahoney. Even as late as November 3rd, 1915, efforts were still being made to tranship the cargo by way of the Panama Railroad, and the National Carbon Company was notified of such efforts.

The National Carbon Company introduced upon the trial of this case a telegram addressed to it under date of November 4th, 1915, which read as follows:

"Portland, Ore., 11-4-15.

National Carbon Co.

Using all means possible make disposition Eureka cargo with least possible delay nothing definite yet but hope conclude arrangements any minute when will wire you.

Chas. Kurz."

(Libellant's Exhipit 26.)

Mr. Kurz was the General Manager of L. Rubelli's Sons.

The claimant of the Steamship "Eureka" introduced upon the trial of this case a telegram reading as follows:

"Portland, Oregon, October 16, 1915.

L. Rubbeli & Sons,
Philadelphia.

We are using every means to transfer cargo our views that if we secure boat on Pacific in short time could make delivery before ships through Magellan idea arrangement edison light to exchange cargo situation just as you see it please wire what you are able to do with any one having boat on Pacific what is storage rate at canal.

Oregon California Shipping Co."

(Claimant's Exhibit C.)

These uncontradicted telegrams establish that every possible effort was being made from October 16th, 1915, to November 4th, 1915, to arrange for some method of transhipping the cargo, in accordance with the provisions of the bills of lading, and thus relieve the ship and the shippers from the predicament which had been precipitated by the unforeseen slides in the Panama Canal.

During all of this period of time, the firm of L. Rubelli's Sons and the owner of the steamship were in constant communication with the Master, and

were advising him of the efforts which were being made to accomplish a transhipment of the cargo.

Relying upon these advices and likewise upon the information which he was receiving from the United States Government as to the efforts being made to reopen the Canal, the Master remained at the Atlantic entrance to the Canal until the 4th day of November, 1915.

On November 4th, 1915, the Master, after reviewing the entire situation and concluding that the Canal would not be reopened within a reasonable time thereafter, and further concluding that all efforts at transhipment were futile, determined, in the exercise of his discretion, to sail to the port of New Orleans and tranship the cargo at the expense of the shippers.

This was done. The cargo of the Steamship "Eureka," including that portion thereof belonging to the National Carbon Company, was taken to New Orleans and transhipped by rail from New Orleans to the places of consignment.

On the 8th day of July, 1916, the National Carbon Company filed in the District Court of the United States for the Western District of Washington, Southern Division, a libel against the Steamship "Eureka." This libel set forth the history of the shipments placed on board the Steamship "Eureka," as above outlined, and alleged that the cargo belonging to the libellant was damaged, while on board the

Steamship "Eureka," by reason of its detention at the Atlantic entrance to the Panama Canal.

The libel further alleged that on October 1st, 1915, the libellant first heard of the closing of the Panama Canal, and immediately notified the agents of the steamship concerning the perishable character of the cargo, and that a demand was at the same time made upon the agents of the steamship for a delivery of libellant's cargo at the port of Colon. It was further alleged that those in charge of the Steamship "Eureka" failed and refused to deliver said goods to the libellant. It was likewise alleged that such demand was repeatedly made upon the agents of the Steamship "Eureka" for a long period of time, accompanied by an admonition that a refusal to conform to the demand would result in a total loss of the cargo, because of its perishable nature, and that such demand was nevertheless refused.

The libel further alleged that after the lapse of several weeks following the making of such demand, during which period of time the libellant was in constant communication with those in charge of the Steamship "Eureka," the cargo was delivered to the libellant at New Orleans, Louisana.

The libel also asserted that the alleged demand was accompanied by an offer to pay the expenses of discharging libellant's cargo at Colon, and to pay all costs which might be incurred by the way of restoring other cargo which it might be necessary to remove in order to discharge the cargo of the libellant.

The libel, however, did not allege that at the time of making the alleged demand any effort was made to furnish to the steamship proper wharfage facilities for discharging libellant's cargo at Colon. **The libel did not set forth that any average bond was tendered, in connection with the alleged demand.**

The libel concluded with the statement that by reason of the alleged failure of the Steamship "Eureka" to deliver the libellant's goods in accordance with the alleged demand, such goods arrived at the port of New Orleans in so deteriorated a condition, as to cause the libellant damage in the sum of Ten thousand dollars. The libel contained no specific statement of the character of the damage suffered.

On the 31st day of July, 1916, the Steamship "Eureka" was attached by the United States Marshal for the Western District of Washington, and on the 1st day of August, 1916, the Alaska Steamship Company entered its appearance as claimant and owner of the Steamship "Eureka," and on the 16th of November, 1916, filed its answer to said libel.

The answer alleged that on the 8th day of September, 1915, the Steamship "Eureka" was owned by the Pacific Coast Steamship Company, which company chartered the ship to the Crossett Western Lumber Company, which company in turn sub-chartered the ship to H. M. Williams & Company, which company in turn sub-chartered the ship to the Oregon-California Shipping Company, and that the

shipments referred to in the libel were delivered to the Oregon-California Shipping Company for carriage from the ports of New York and Philadelphia to San Francisco, California, by way of the Panama Canal, and that the said Oregon-California Shipping Company issued to the libellant bills of lading prescribing the terms of carriage of the cargo, and that the libellant paid to the Oregon-California Shipping Company, in advance, the freight for the carriage of said shipments.

The answer further alleged that the shipments in question were never delivered to the consignees at the respective destinations, but that all of the shipments were delivered to the libelant at New Orleans, Louisiana, at the libellant's special order and request.

The answer denied that the Steamship "Eureka" had failed to perform its contract of carriage. The answer denied that any demand was made upon the steamship for delivery of the cargo at the port of Colon, and further denied that the steamship at any time refused to make such delivery.

The answer then set forth, as the true facts of the transactions referred to in the libel, the general history of the "Eureka's" departure from New York and Philadelphia with the cargo in question, and its detention at the Atlantic entrance to the Panama Canal, by virtue of the slides which occurred therein. It further alleged by way of defense, the impossibility of continuing the voyage on account of said slides.

It then set forth the history of the conditions which confronted the Master of the ship caused by the slides in the Panama Canal, and referred to the various provisions of the bills of lading providing for contingencies of this character. The material parts of the provisions referred to were as follows:

> "1. It is mutually agreed * * * that in case the steamer shall * * * be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamer; * * * that the carrier shall not be liable for loss or damage occasioned by causes beyond his control or accidents of navigation of whatsoever kind, * * *; that the carrier shall not be liable for loss or damage occasioned by * * * change of character, * * * or any loss or damage arising from the nature of the goods * * * nor for any loss or damage caused by the prolongation of the voyage."

> "2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transhipment."

> "8. When the loading, transport, transhipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be en-

titled to load, discharge, tranship, put into warehouse or quarantine depot, or into a lighter, hulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all expenses of transhipment or warehousing of Customs, * * * and all extra expenses of whatever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods."

The answer then continued to set forth the history of the efforts made to tranship the cargo by the different routes already referred to, as well as by the Straits of Magellan, and further alleged that while the steamship was so detained at Colon the libellant insisted and demanded that its cargo be transhipped, and that it would hold the ship liable if its cargo was taken by the Straits of Magellan.

It then continued to allege that after the ascertainment of the fact that the Canal would not be opened within a reasonable time, and the further fact that all efforts to accomplish a transhipment were futile, the Master, acting in the interests of all the consignors and consignees, proceeded on the 5th day of November, 1915, to the port of New Orleans, where she arrived on the 12th day of November, 1915, and that on October 24th, 1915, and prior to the time that the Steamship "Eureka" proceeded to New Orleans, all of the consignees of cargo, including the libellant, were advised that the steamship would be sent to New Orleans for the discharge of her cargo,

and that the libellant and its agent, F. H. Murray, received said notice, and immediately thereafter consented to the sending of the steamship to New Orleans, and the transhipment of libellant's cargo by rail, to its destination.

It then continued to allege that, in accordance with the request and order of the libellant, its cargo was delivered to it at Chalmette docks in New Orleans, Louisiana, between the 16th and 20th of November, 1915.

It then set forth as an affirmative defense the stereotyped provisions of the bills of lading excusing the carrier from damage to goods on account of inherent weakness, natural causes, evaporation, etc., and asserted that the damage, if any, to the cargo in question arose from one of the excepted causes, and that such damage must have arisen from the fact that the cargo was not in good order and condition at the time of shipment. It likewise alleged that the owners, charterers and agents exercised all diligence in the equipment and management of the vessel.

The answer then set forth the provisions of the bills of lading requiring notice of damage to be filed with the Steamship Company, and alleged that no such notice was filed within the time required by the terms of the bills of lading.

The prayer of the answer asked for a dismissal of the libel, and for a release of the attachment, at

the cost of the libellant. The issues created by these pleadings were substantially as follows:

The libellant contended that immediately after the slides in the Panama Canal took place, it made a demand upon the firm of L. Rubelli's Sons for a delivery of its cargo at the port of Colon. It further contended that the firm of L. Rubelli's Sons was the general agent of the Steamship "Eureka", and the proper party upon whom to make such a demand for the delivery of its cargo at the port of Colon.

It was insisted, on behalf of the steamship, that the firm of L. Rubelli's Sons was not the general agent of the steamship "Eureka", and that no demand was in fact, made for a delivery of the cargo at the port of Colon, and that such a demand, if made, created no liability upon the part of the steamship to respond in damages, and that the steamship performed all obligations resting upon it in reference to the cargo in question.

The case came on for trial on the 10th day of July, 1917, before the District Court of the United States, for the Western District of Washington, Southern Division, and the court, after hearing all the evidence, entered a decree in favor of the Steamship "Eureka" and the claimant, dismissing the libel.

The court's decision very exhaustively analyzed the evidence offered by the libellant in support of its claim that it had made a demand upon the firm of L. Rubelli's Sons for a delivery of its cargo at Colon.

The evidence offered in support of its claim was offered for the purpose of establishing that the firm of L. Rubelli's Sons, was the General Agent of the Steamship "Eureka", and, therefore, the proper party upon whom to make the alleged demand.

After examining this evidence, the court found that there was no proof of any written agreement defining the existence or scope of an agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, the special owner of the steamship.

The court likewise found that there was no evidence showing any act upon the part of the Oregon-California Shipping Company which could be construed as misleading the National Carbon Company upon the subject of any agency existing between the Oregon-California Shipping Company and the firm of L. Rubelli's Sons.

The court further found that Mr. Kurz, who was the general manager of the firm of L. Rubelli's Sons, and who was a witness on behalf of the National Carbon Company, testified that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, and acted as limited agent only for the purpose of soliciting cargo on the Steamship "Eureka."

The court likewise found that the only information which was imparted to the Oregon-California Shipping Company by the firm of L. Rubelli's Sons concerning the subject of an alleged demand for a de-

livery of the cargo was Colon was a telegram of October 18th, 1915, sent by L. Rubelli's Sons to the Oregon-California Shipping Company, which read as follows:

"Philadelphia, Oct. 18, 1915.

Oregon-California Shipping Co.

National Carbon Company insist that shipments Eureka should not go via Magellan account batteries would be worthless on arrival destinations stop they offered pay all expenses discharging including loading back on board any other goods in order to forward their goods from Colon stop. We made them proposition our wire fourteenth which they state very satisfactory stop to avoid heavy claims better tranship cargo wire quick. L. Rubelli's Sons."

(Libelant's Exhibit 12.)

The court found, however, that the above telegram which was sent more than two weeks after the alleged demand for a delivery of the cargo at the port of Colon, which demand is alleged to have been made on October 1st, 1915, was not the transmission of a demand for delivery at Colon, but the submission of an entirely different proposition, and that when properly construed, the effect of such telegram was to lead the Oregon-California Shipping Company to believe that any desire for a delivery at Colon had been abandoned. In other words, the court construed the above telegram as directly nega-

tiving the idea of a demand for the delivery of the cargo at the port of Colon.

It developed upon the trial that certain telegrams passed between the firm of L. Rubelli's Sons and the Captain of the "Eureka" while she was at the port of Colon, but the court found that such telegrams and communications were explainable on the theory that an effort was being made to procure new cargo for the "Eureka" through the assistance of L. Rubelli's Sons, who had solicited the first shipment, and upon the further theory that L. Rubelli's Sons were interested in advising the shippers of cargo on the voyage in controversy, of the conditions existing at Colon, and to assist them in transhipping their goods, if possible, in order to maintain the good will of such shippers.

The court further found, however, that the Captain of the ship carried out no orders from L. Rubelli's Sons involving the management of the ship.

The court, therefore, concluded that the appellant had failed to establish by direct proof, the existence of any general agency between the charterer of the Steamship "Eureka" and the firm of L. Rubelli's Sons, and then discussed the subject of an alleged agency by implication.

Upon this phase of the case, the court found an absence of any evidence establishing a state of facts sufficiently strong to support any implied general agency between the firm of L. Rubelli's Sons and the Steamship "Eureka." In other words, the court

found the absence of any proof of a continued course of dealing between the owners of the Steamship "Eureka" and the firm of L. Rubelli's Sons from which a general agency could be implied as a matter of law.

The court further found that:

> "There is no evidence of any single instance in which that company (L. Rubelli's Sons) acted upon or settled any disputed or questioned claim against the 'Eureka', or for that matter, a claim of any kind."

The court further found that the charter involved in this controversy contemplated other voyages than the one in question, and that there was no evidence to show but that the firm of L. Rubelli's Sons terminated their connection with the Steamship "Eureka" at the termination of the present voyage. The court likewise found the absence of anything more than a general understanding that the firm of L. Rubelli's Sons would continue for an indefinite time to provide cargo on the "Eureka's" trips from the Atlantic seaboard.

From all of these findings, the court concluded that the record failed to establish by direct proof any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, and likewise concluded that no such general agency could be implied from a record which negatived the existence of any established course of dealing between the Oregon-California Shipping Company

and the firm of L. Rubelli's Sons in relation to the handling of the Steamship "Eureka."

The trial court's able analysis of the evidence bearing upon this question of general agency, and the inevitable conclusion which followed therefrom, led the court to the further conclusion that the appellant's asserted claim against the steamship "Eureka" must fail, because the only groundwork laid as a basis to support such claim, was an alleged demand upon the firm of L. Rubelli's Sons for a delivery of the appellant's cargo at the port of Colon, and that such demand, whether sufficient in point of law or not, was made upon a party who had no authority to conform therewith.

From the action of the court in rendering its decision, the present appeal has been perfected.

The appellant assigns as error the action of the trial court in entering a final decree dismissing the libel, and in failing to hold the Steamship "Eureka" at fault on account of the acts set forth in the libel.

The appellee respectfully contends that the findings and conclusions of the trial court were in all respects correct, and that the action of the trial court in dismissing the libel should be affirmed, and as a basis for its contention submits the following points and authorities.

POINTS AND AUTHORITIES

I.

The appellee's theory of the present case is that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, and that said firm had no authority to conform to the alleged demand of the National Carbon Company for a delivery of its cargo at the port of Colon; that the trial court was correct in finding the absence of any general agency between the firm of L. Rubelli's Sons and the National Carbon Company; that the record in this case offers no sufficient evidence of any demand for the delivery of the appellant's cargo at the port of Colon; that the Master of the Steamship "Eureka", as the agent of all parties having an interest in the voyage, exercised a reasonable discretion in taking the cargo to the port of New Orleans.

II.

The existence of an agency is a question of fact; the scope of an agency is a question of law.

Vol. 44 Century Digest, Principal and Agent, Secs. 724, 726.

III.

Where the evidence establishes both the fact of

and the scope of an agency, the court is not called upon to determine such scope as a proposition of law.

IV.

When an endeavor is made to charge a principal with the exercise of authority by an agent, as to certain specific acts, and such authority is to be implied from the performance of other acts, the evidence as to such other acts must show that such other acts involved the exercise of authority similar in character to the authority sought to be implied. An implied agency as to certain acts cannot be based on proof of an agency showing the performance of dis-similar acts.

Stratton vs. Todd, 82 Me. 149; 19 Atl. 111.

Hazeltine vs. Miller, 44 Me. 177, 179-181.

V.

When a party seeks to charge a principal with the acts of an alleged ostensible agent, there must be some showing that such party was misled by the act of the principal in holding out the ostensible agent, or that the ostensible agency was knowingly created by the principal.

VI.

A party cannot base a claim against a principal upon an alleged implied agency, limited in scope, of which limited scope such party had knowledge.

VII.

Where a ship is carrying a mixed cargo, and its voyage is temporarily interrupted, and one single shipper demands a premature delivery of its cargo before the ship reaches the ultimate destination, such demand must be accompanied by a tender of proper wharfage facilities for discharging the cargo, and by a tender of a bond to protect the ship against the reciprocal claims of all shippers, and the interests of no one shipper should ever at any time be preferred against the interests of all other shippers. It must further appear that the duration of the impediment is fixed and determined.

The Martha, 35 Fed. 314.

VIII.

The obligation of a carrier to complete the contract of carriage is only suspended, and is not abrogated by a temporary obstruction to the completion of the voyage.

Bennet vs. Bryam & Co., 38 Miss. 17; 75 Am. Dec. 90, 93.

Hand vs. Baynes, 4 Wharton. 204; 33 Am. Dec. 54, 55, 56.

IX.

The provision of a bill of lading allowing a carrier to tranship a cargo at the cost of the shipper

when the ship is confronted with unforseen difficulties is a proper, enforcible and reasonable provision.

Pacific Coast Co. vs. Yukon Independent Transportation Co., 155 Fed. 35.

X.

Where the provisions of a bill of lading provide that the carrier may tranship cargo at the expense of the shipper, the Master may take advantage of such provisions providing he does not take unreasonable advantage of the bargain.

The Citta De Messina, 169 Fed. 472, 474, 477.

XI.

In view of the fact that the Master is the agent of all parties concerned, including the owner, the ship and all of the shippers, no single shipper has the right to demand a premature delivery of its cargo during a temporary impediment to the progress of the voyage, to the detriment of the interests of the other shippers.

The Steamship Styria vs. Morgan, 186 U. S. 1.

XII.

When a Master is confronted with an unforseen difficulty, and a temporary impediment to the progress of his voyage such as an obstruction in a Canal,

it is the duty of the Master to remain at the entrance to the Canal until such time as the approximate continuation of the impediment can be finally determined.

Hand vs. Baynes, 4 Wharton. 204; 33 Am. Dec. 54, 55, 56.

XIII.

The Master of a ship is the agent of all parties concerned, and owes an equal obligation to the ship, its owner, and each and all of the shippers. When unforseen difficulties interrupt the progress of his voyage he is called upon to exercise a discretion, and such discretion means the absence of any fixed rule of conduct.

The Steamship Styria vs. Morgan, 186 U. S. 1.

The Kronprinzessin Cecilie, 244 U. S. 12.

XIV.

The Master, as the agent of the shippers, owes a duty to the shippers to tranship the goods at their cost when he is confronted with unforseen difficulties impeding the progress of his voyage, regardless of the bill of lading.

Shipton vs. Thornton, 9 Adolph & Ellis, 312-336.

XV.

Where the progress of a voyage is interrupted by some unforseen obstruction, and damage to a cargo ensues therefrom, such unforseen obstruction is the proximate cause of the injury, and the carrier cannot be held liable for the damages unless it is established that he was guilty of some negligence independently of the unforseen contingencies which was the proximate cause.

Empire State Cattle Co. vs. Atchison, T. & S. F. Ry. Co., 135 Fed. 135-140-141.

XVI.

Where the provisions of a bill of lading exempt a carrier from damage to goods by heat, and it appears that damage to a cargo comes within the provisions of such bill of lading, the burden is cast upon the cargo owner to show some negligence upon the part of the carrier in order to deprive the carrier of the benefit of such exceptions in the bill of lading.

The St. Quentin, 162 Fed. 883-884.

XVII.

"It is generally held that in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural

and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of the attending circumstances."

Railway Company vs. Kellogg, 94 U. S. 469.

ARGUMENT.

The theory of the appellant's claim against the Steamship Eureka is confined solely to the alleged demand made upon the firm of L. Rubelli's for a delivery of its cargo at the port of Colon. This theory was announced by the proctors for the appellant upon the trial of this case, and is evidenced by the allegations of the libel.

The averments of the libel in this particular were as follows:

> "The agents of the S. S. 'Eureka' informed your libellant that the S. S. 'Eureka' was detained because of the closing of the Canal, and was then at the port of Colon. Your libellant immediately notified the agents for the said steamship 'Eureka' of the perishable character of the goods which your libellant had shipped on board the steamship 'Eureka' as aforesaid, and your libellant offered to pay for the discharge of the said goods, and in addition to pay all costs which might be incurred by the way of restoring other cargo on the steamship 'Eureka', which it might be necessary to move in order to discharge the cargo of your libellant and demanded the delivery of its said goods at Colon. * * * It was then discovered that the said cargo was badly dam-

aged, as a result of the failure of the said Steamship to perform its contracts as aforesaid, and the failure of those in charge of her to deliver to the libellant the said goods when demand for delivery thereof was made as aforesaid."

(Apostles on Appeal, Pages 9-10.)

The reference in the last quotation to the failure of the Steamship to perform its contracts, refers to prior allegations of the libel setting forth the impediments to the completion of the voyage on account of the slides in the Panama Canal and the alleged refusal of the Steamship's agents to deliver the cargo at the port of Colon.

In addition to the above allegations, the appellant confirmed its theory by the following statement which it set forth on page 14 of the brief submitted by its proctors to the trial court.

"The libelant is not suing for damages for delay, but is claiming damages for refusal of the Steamship owner to deliver his goods to him at Colon when demanded."

The only question, therefore, which the appellant presented to the trial court upon the hearing of this case, was the question of whether or not, the appellant had made a demand upon the Steamship "Eureka" for a delivery of its cargo at Colon, and whether the alleged refusal to conform to such de-

mand created a liability on the part of the steamship in favor of the National Carbon Company.

In other words, the appellant contended upon the trial of this case that it made a demand upon L. Rubelli's Sons, the authorized agents of the Steamship "Eureka", for a delivery of its cargo at the port of Colon, and that the failure of the steamship owners to conform to this demand resulted in an unwarranted delay of the cargo in the waters of the torrid zone, and consequent damage to the goods to the detriment of the owner. It also contended that the owners of the Steamship "Eureka" were legally liable to the appellant for their acts in causing this damage.

The appellee contended upon the other hand, that no demand for the delivery of the goods at the port of Colon was in fact made, and further contended that the firm of L. Rubelli's Sons was not the general agent of the steamship owners and was not therefore a proper party upon whom to make such a demand. The appellee further contended that the Steamship "Eureka" was under no obligation to deliver any portion of its cargo at Colon, even though a proper demand had been made. It contended in other words, that no single shipper of a mixed cargo can lawfully demand his portion of such cargo, during the continuance of a voyage, to the detriment of other cargo owners.

It, therefore, became incumbent upon the appellant to prove that a demand had been made for the

delivery of its cargo at the port of Colon, and that such demand was made upon the authorized representatives of the Steamship "Eureka."

The only evidence offered by the appellant on the trial of this case to prove the making of any demand for the delivery of its cargo at Colon was the following testimony of Mr. Anson Mitchell, its traffic manager, and Mr. Charles Kurz:

"Q. Who are Phelps Brothers & Company?

A. New York agents of Rubelli's Sons, act as agents for the Oregon-California Shipping Company.

Q. Are they the agents of this vessel? A. Yes. After leaving New York I went to Philadelphia and interviewed Mr. Kurz, Mr. Davis and Mr. Bates.

Q. Who was Mr. Bates? A. Mr. Bates, as I understand, is agent representing the Oregon-California Shipping Company at Philadelphia.

Q. How do you understand he is agent? A. By signatures to the bills of lading, and also by his saying so.

Q. Who is Mr. Davis? A. Mr. Davis, I understand, is general freight agent and represents Mr. Kurz, of Rubelli's Sons, who are acting as agents for the Oregon-California Shipping Company at Philadelphia.

Q. Are these gentlemen all agents of the S. S. Eureka and her charterers, the Oregon-California Shipping Co.? A. That was my understanding.

Q. How did you get that understanding?

A. From conversations with these gentlemen and also from signatures to the bill of lading offered in evidence.

Q. Did they all tell you that they were agents of the company? A. Yes.

Q. More than once? A. At various times.

Q. Were they engaged in the business of the ship and its cargo? A. Yes.

Q. Were then engaged in the business of the ship and its cargo? A. Yes.

Q. They conducted negotiations with you in respect to that? A. They did.

Q. Did they have negotiations with you with respect to the forwarding of this cargo?

A. They did.

Q. After there was delay in transmission?

A. Yes, sir.

Q. Now, on or about October 9th, when you

saw these gentlemen in Philadelphia, what took place? A. I explained to them the detail and character of the goods, and at that time we went into the question as to whether or not it would be advisable, or whether we could take the goods out of the ship. They called their foreman upstairs, and he brought up the loading sheet,—I presume they call it that, I don't know the technical name—but the loading sheet showing where the goods which had been received at Philadelphia had been loaded, in what part of the boat, and I asked for the approximate expense to unload these barrels. I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time.

Q. You made a demand for the delivery of the goods at Colon at that time? A. I did.

Q. What did you explain to them was the nature of these goods? A. I told them that the

nature of a dry battery is that after we ship a battery we are supposed to impress upon our people and all dealers that after 90 days or approximately thereto the life of a cell deteriorates or the cell itself deteriorates, and that we would guarantee our batteries to be as good 90 days from the date of shipment as the date of shipment, and we would stand back of and replace any batteries which went bad in that time. Also told them that heat would affect the batteries to such an extent that they would deteriorate very much faster than if kept in a cool place."

(Libelant's Exhibit 1, pages 18, 19-20.)

Mr. Kurz testified as follows:

"Q. Do you remember whether Mr. Mitchell came down to Philadelphia about October 9th?

A. I do.

Q. Did he have any discussion with you then relating to these shipments?

A. He did.

Q. At that time did he offer to pay the expenses of unloading this cargo and landing the same at Colon?

A. He did.

Q. Did he call upon you subsequently to that at Philadelphia, about October 23rd?

A. He did.

Q. Did he at that time repeat his offer?

A. He did.

Q. Did he offer at that time to pay all costs and expenses of unloading and landing the goods at Colon?

A. He did.

Q. Did he tell you at both of these times that these goods would be greatly damaged if they were not unloaded immediately at Colon?

A. He did."

(Testimony of Mr. Kurz, pages 137, 138, 139, Libelant's Exhibit 1.)

It thus appears that the only evidence offered by the appellant, in support of its alleged demand was a conversation between its manager and Phelps Bros. & Co., Mr. Kurz, Mr. Davis and Mr. Bates, each of whom was a member of the firm of L. Rubelli's Sons. Mr. Kurz was the general manager of L. Rubelli's Sons; Mr. Davis was the traffic manager of L. Rubelli's Sons; Mr. Bates was the assistant traffic manager of L. Rubelli's Sons. These facts appear from one of the appellant's own exhibits in-

troduced upon the trial of this case as Libelant's Exhibit 85.

In addition to the above testimony, Mr. Anson J. Mitchell, the traffic manager of the National Carbon Company, admitted upon cross examination, that no demand for the delivery of its cargo was made directly upon the Steamship "Eureka" or her Captain by the National Carbon Company, while she was detained at the port of Colon. His testimony upon this subject was as follows:

"Q. Where you ever at Colon? A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the libelant to handle that portion of the cargo of the S. S. Eureka which was shipped by the National Carbon Company during any time that the steamship Eureka was detained at the east side of the Panama Canal?

Mr. Welles: Objected to as incompetent, irrelevant and immaterial upon the issues in this action.

A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, and the American Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I

could make satisfactory arrangements to have the goods brought back to New York.

Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at any time during the time that the Eureka was detained at Colon, on the east side of the Panama Canal, for the handling of that portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes.

Q. Did the National Carbon Company address any direct communication at any time while the Eureka was detained at Colon, at the eastern entrance to the Panama Canal, to the ship or to the captain of the ship, in charge thereof? A. No.

(Libelant's Exhibit 1, page 185-186.)

(Typewritten Transcript of Evidence, 211-212.)

The record of the appellant's own evidence limits its claim of a demand for the delivery of its cargo at Colon, to the conversation between its traffic manager, Mr. Mitchell, and the members of the firm of L. Rubelli's Sons, explaining to them the nature of appellant's cargo and discussing the advisability of

taking the goods out of the ship, which alleged conversation is modified by the further statements of Mr. Mitchell that he was never at the port of Colon, and that he had made no definite arrangements for the unloading or the transhipment of the cargo in the event that the same was delivered to him at Colon, augmented by the further admission that no demand for the delivery of the cargo was ever made upon the steamship or its Captain.

The appellant has based its entire claim of $10,000.00 upon this alleged conversation between Mr. Mitchell, its traffic manager, and the members of the firm of L. Rubelli's Sons. It, therefore, becomes necessary at the very outset of this controversy to determine whether or not the firm of L. Rubelli's Sons was the general agent of the Steamship "Eureka" or its owners and the proper party upon whom to make a demand for the delivery of its cargo at Colon.

In order to properly consider the question of agency as involved in the case at bar, the court should constantly keep in mind the ultimate consequences necessarily anticipated by a failure to conform to the alleged demand. Such a constant consideration of those ultimate consequences will impress the reader with their gravity. This in turn will emphasize the importance of requiring a high degree of proof to establish agential authority sufficiently broad in scope to embrace power to determine such consequences for another. Such consideration will likewise give a deeper insight into the trial

court's decision and bring to view his careful consideration of the evidence in this case.

The National Carbon Company had knowledge of the extraordinary difficulties which confronted the Steamship "Eureka" at the port of Colon, and likewise had knowledge of the possible injury which might result in keeping its dry cells for too long a time within the limits of the torrid zone. According to the allegations of its own libel, it informed the agents of the Steamship Company of the damage to the cargo which would necessarily ensue, and continued such notification for a long period of time. The allegations of the libel in this particular are extremely strong. Such allegations are as follows:

> "Thereupon your libelant repeatedly renewed the said request and demanded of those representing the said Steamship 'Eureka' that this cargo be delivered at once to your libelant at Colon, again notifying those representing the said steamship that unless such a delivery was made the cargo would be a total loss because of its perishable nature."
>
> (Apostles on Appeal, bottom of page 9 and top of page 10.)

The paragraph of the libel from which the above excerpt is taken begins with the assertion, that the National Carbon Company knew of the conditions confronting the Steamship Eureka, on account of the slides in the Canal, as early as October 1st, 1915, and immediately thereafter notified the Steamship's

agents of the perishable character of the cargo and made a demand for its delivery at Colon. It, therefore, appears from the appellant's affirmative admissions that during the entire period of the difficulties out of which the present controversy arose, it had full knowledge of the vital consequences which would follow from a failure to deliver the cargo at Colon and must, therefore, have been fully impressed with the importance of making so crucial a demand upon the proper party.

When the evidence offered to establish the alleged agency between the Steamship Eureka and L. Rubelli's Sons is viewed in the light of these important and admitted circumstances, it becomes much easier to determine the value of such evidence when offered in support of an implied agency.

It must constantly be borne in mind that the appellant has at no time attempted to estabish an agency between the Steamship Eureka and L. Rubelli's Sons by any written authority or by any affirmative oral authority.

The alleged agency rests solely upon indirect evidence, from which evidence the appellant is asking the court to imply an agency sufficiently broad in scope to maintain a legal liability against the Steamship Eureka, on the basis of an alleged demand made solely upon such agent.

The undisputed evidence introduced upon the trial of this case, establishes the fact of an existing agency between the shippers of the cargo on the

Steamship Eureka, on this particular voyage, and the firm of L. Rubelli's Sons and the Steamship "Eureka." This agency, however, was confined solely to the acts of L. Rubelli's Sons in soliciting cargo for the Steamship Eureka and in soliciting space for such cargo. This fact appears from the testimony of Mr. Charles Kurz, a witness produced on behalf of the appellant itself. The testimony of Mr. Kurz in this particular was as follows:

> "Q. You did not at any time claim to anyone or with anyone to be the general agent of the Oregon-California Shipping Company? A. Well, we did advertise ourselves as general agents in the east of the Oregon-California Shipping Co.
>
> Q. I hand you now Libelant's Exhibit 39, in which you use the phrase 'in reply we beg to refer you to our letter of December 3rd, wherein we advised you that Messrs. Phelps Brothers & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer?'
>
> A. That is right, that is what we did do, the general agency that I referred to meant that we had charge of the different sub-agents but only as to the solicitation of cargo.
>
> Q. In other words, you at no time held yourself out, and do not now, to have ever been the general agents in the broad general sense of a complete agency for all matters of every

kind and nature of the Oregon-California Shipping Co? A. We were only the general agents in so far as picking up freight was concerned; booking freight.

(Testimony Mr. Kurz, Libelant's Exhibit 1, pages 149-150.)

(Typewritten Transcript of Evidence, 167 to top of 169.)

The testimony above set forth, which came from the mouth of one of the appellant's own witnesses, establishes affirmatively the fact of a limited agency between L. Rubelli's Sons, of which firm Mr. Kurz was general manager, and the Oregon-California Shipping Company, the sub-charterer of the Steamship Eureka, and at the same time negatives the existence of any general agency between L. Rubelli's Sons and the charterers of the Steamship Eureka.

In addition to the above testimony, the appellant introduced in evidence, upon the trial of this case, a letter bearing date December 3rd, 1915, in which appears the following statements:

Stevedores Cable Address Wharfage
Talleymen "Rubelli" Weighers

L. Rubelli's Sons

STEAMSHIP AGENTS — GENERAL FORWARDERS—CUSTOM HOUSE BROKERS

Pier 16 S. Delaware Ave.
(Foot of Dock Street)

Notaries Public Lightermen

PHILDELPHIA, Dec. 3, 1915.

In your reply please refer to.....

National Carbon Company,
Cleveland, Ohio.

Gentlemen:

S. S."Eureka"

Your favor of the 1st inst. addressed to Messrs. Phelps Bros. & Co. and ourselves is at hand and in reply we beg to advise you that Messrs. Phelps Bros. & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer at New York and Philadelphia for account of the Oregon-California Shipping Co., Inc., of Portland.

Neither Messrs. Phelps Bros. & Co. or ourselves had any interest other than in the capacity as agents as above outlined.

All we can do under the circumstances is to refer your letter to Mr. H. M. Williams, General Manager of the Oregon-California Shipping

Co. of Portland, who we understand is still at New Orleans.

Yours very truly,

L. RUBELLI'S SONS,

CK/B Chas. Kurz.

Cy Phelps Bros. & Co., N. Y.

H. M. Williams, General Manager,
Oregon-California Shipping Co., Inc.,
% Santa Fe Ry., New Orleans, La.

(Libelant's Exhibit 33 attached to typewritten Transcript of Evidence.)

The above letter introduced by the appellant itself as part of its own case, corroborates the oral testimony of Mr. Kurz, and positively negatives the existence of any general agency between the Oregon-California Shipping Company and L. Rubelli's Sons.

In addition to the above letter, the appellant likewise introduced in evidence another letter bearing date December 8th, 1915, which reads as follows:

Stevedores Cable Address Wharfage
Talleymen "Rubelli" Weighers

L. RUBELLI'S SONS

STEAMSHIP AGENTS—GENERAL FORWARDERS—CUSTOM HOUSE BROKERS

Pier 16 S. Delaware Ave.
(Foot of Dock Street)

Notaries Public Lightermen

Philadelphia, Dec. 8, 1915.

In Your reply please refer to.....

Mr. A. J. Mitchell, Traffic Mgr.,
The National Carbon Co.,
Cleveland, O.

Dear Sir:—

Your favor of 6th instant addressed to Messrs. Phelps Bros. & Co., New York, and ourselves with regard to batteries shipped on the SS "Eureka" is at hand.

In reply we can only repeat what we wrote you on the 3rd instant, and are, therefore, referring your letter of 6th instant to Mr. H. M. Williams, General Manager of the Oregon-California Shipping Co. of Portland, who we understand is still at New Orleans.

Yours very truly,

L. RUBELLI'S SONS,

CK/Go. Chas. Kurz.

CC to Mr. H. M. Williams,
Phelps Bros. & Co. N. Y.

(Libelant's Exhibit 37 attached to typewritten Transcript of Evidence.)

The letter above set forth, which was introduced in evidence by the appellant itself, confirms the oral testimony of Mr. Kurz by confirming the statements contained in the letter of December 3rd, 1915, above set forth.

In addition to the above letters, the appellant likewise introduced a letter bearing date January 13th, 1916, which reads as follows:

Stevedores Cable Address Wharfage
Talleymen "Rubelli" Weighers

L. RUBELLI'S SONS

Steamship Agents—General Forwarders—Custom House Brokers.

Pier 16 S. Delaware Ave.
Foot of Dock Street)

Notaries Public Lightermen

Philadelphia, Jan. 13, 1916.

In your reply please refer to.....

Mr. A. J. Mitchell, Traffic Mgr.,
National Carbon Co.,
Cleveland, O.

Dear Sir:

SS. "Eureka"

Your letter of 11th instant addressed to the

Mannheim Insurance Co., Oregon-California Shipping Co., Phelps Bros. & Co., and ourselves, is at hand.

In reply we beg to refer you to our letter of Dec. 3, wherein we advised you that Messrs. Phelps Bros. & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer at New York and Philadelphia for account of the Oregon-California Shipping Co., Inc., of Portland.

Neither Messrs. Phelps Bros. & Co. nor ourselves had any interest other than in the capacity as agents, as above outlined.

We are referring your letter to the Oregon-California Shipping Co., Portland, Ore., and shall be pleased if you will address them all future letters on this subject, instead of addressing same to Phelps Bros. & Co. or ourselves.

We can assume no responsibility whatsoever in the premises.

Yours very truly,

J. H. PELLY,
Liquidator.

Stamped
Received
14 Jan., 1916.

(Libelant's Exhibit 39, attached to typewritten Transcript of Evidence.)

The above letter in turn confirms the oral testimony of Mr. Kurz, and the other letters already referred to negativing the existence of a general agency between the Oregon-California Shipping Company and L. Rubelli's Sons.

In addition to the above, the appellant introduced in evidence another letter bearing date January 13th, 1916, which reads as follows:

PHELPS BROTHERS & CO.,
17 Battery Place New York.
327 South La Salle Street, Chicago.
Chamber of Commerce Bldg., Boston.
Cablegrams, Phelps, New York.

New York, January 13th, 1916.

National Carbon Company,
Cleveland, O.

Gentlemen:—

Attention of Mr. Anson J. Mitchell, Traffic Manager.

We have your favor of the 11th. inst. respecting shipments of dry battery cells on the S/S "Eureka". As per our previous letters, we beg to advise that it will be necessary for you to discuss this particular subject of claims on your shipments per above steamer direct with the Oregon-California Shipping Company, Portland, Oregon.

We only acted as agents and have no connection with these people at present, and are, therefore, not in a position to give you a proper reply in reference to your claims.

We would appreciate, therefore, if you will address the Oregon-California Shipping Company in reference to the matter, and we have no doubt that they will advise you fully what they are disposed to do.

Yours truly,

PHELPS BROTHERS & CO.,
AGENTS.
Per J. U. English.

JE/HBD
(Copy to Rubelli)
(Copy to Oregon-California Shipping Co.)

(Libelant's Exhibit 40, attached to typewritten Transcript of Evidence.)

The above letter likewise confirms the oral testimony of Mr. Kurz and completes the chain of letters introduced by the appellant itself, as affirmative assertions, negativing the existence of any general agency between the Oregon-California Shipping Company and L. Rubelli's Sons.

We have then the oral testimony of Mr. Chas. Kurz, a witness on behalf of the appellant, to the effect that L. Rubelli's Sons, of which firm Mr. Kurz was general manager, was the agent of the Oregon-Cali-

fornia Shipping Company or the Steamship Eureka, only for the purpose of soliciting space for cargo. This testimony is in turn corroborated by the letter of December 3rd, 1915, the letter of December 8th, 1915, the letter of January 13th, 1916, and the further letter of January 13th, 1916, all of which have been set forth above, positively stating, that the firm of L. Rubelli's Sons, "acted only as agents in the solicitation and providing of cargo, * * * and had no other interest than in the capacity as agents as above outlined."

It should be constantly remembered that the testimony of Mr. Kurz was introduced by the appellant itself and each one of the letters referred to was introduced by the appellant itself and, therefore, the negation of a general agency appears from the face of the appellant's own record.

According to the allegations of the appellant's own libel the appellant learned on October 1st, 1915, that the Panama Canal was closed to navigation and immediately notified the agents of the Steamship Eureka of the perishable character of the goods which the appellant had shipped thereon, and immediately demanded a delivery of the goods at Colon and likewise notified the agents of the steamship that the cargo would be a total loss if they did not conform to such demand. These allegations appear in the seventh paragraph of the libel on pages nine and ten of the Apostles on Appeal. In spite of these allegations, however, the appellant itself introduced in evidence a telegram addressed to the Oregon-Cali-

fornia Shipping Company demanding transhipment of its cargo, which demand was made as late as October 25th, 1915, more than three weeks after the appellant had learned of the slides in the Panama Canal and the consequent difficulties which confronted the Steamship Eureka. The telegram referred to reads as follows—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Oct. 25, 1915.

Oregon-California Shipping Co.,

Railway Exchange Bldg., Portland, Oregon.

Confirming notice to your agents Rubelli, Philadelphia, in person October ninth, by telephone October fourteenth, sixteenth and nineteenth, and in person October twenty-second and twenty-third by our Traffic Manager A. J. Mitchell, we demand and insist our cargo valued about fifteen thousand dollars on steamer Eureka, be transshipped immediately, our expense. Should Eureka containing our cargo proceed via Magellan, we will hold you and owners legally liable for value of goods and damages. Our cargo perishable and worthless unless transshipped immediately and hurried to

destination. Considerable damages already accrued by reason your failure to transship in accordance our instructions October ninth. Have informed Rubelli we will agree to proposition they wired you fourteenth.

NATIONAL CARBON COMPANY.

FB

(Printed on side)

COPY FOR OUR FILES.

(Libelant's Exhibit 17, attached to typewritten Transcript of Evidence.)

If it is true that as early as October 1st, 1915, the appellant made a demand upon L. Rubelli's Sons for the delivery of its cargo at Colon, believing that the firm of L. Rubelli's Sons was the general agent of the Steamship Eureka and its charterers, then why did the appellant as late as October 25th, 1915, more than three weeks after the alleged demand for delivery at Colon, make a demand for the transhipment of its cargo and make such demand directly upon the owners of the Steamship.

According to the allegations of the libel above referred to, the alleged demand of October 1st, 1915, for the delivery of its cargo at Colon was of far greater importance than the demand for the transhipment of October 25th, 1915, because, according to the allegations of the libel, the appellant was very solicitous on October 1st, 1915, to procure its cargo, on account of

its alleged perishable character; and yet more than three weeks thereafter, during which time the Steamship had been detained in the waters of the torrid zone, the appellant was insisting that the same cargo be transhipped.

The alleged demand of October 1st, 1915, for the delivery of the cargo at Colon, which according to the libel was the all important demand, was made upon the firm of L. Rubelli's Sons whom the appellant considered to be the agent of the Steamship and the owners. The less important demand, however, of October 25th, 1915, was made, not upon the firm of L. Rubelli's Sons, but directly upon the owners of the Steamship.

Furthermore, in the telegram last referred to, the appellant states that it had informed Rubelli that it would agree to the proposition submitted on October 14th. We are unable to find in the record the proposition referred to, but if such proposition did in fact exist, and, as is now contended, L. Rubelli's Sons were the general agents of the Oregon-California Shipping Company, then why was it necessary for the appellant to advise the special owner that they would agree to the proposition submitted by L. Rubelli's Sons?

In addition to the above evidence, the appellant, on October 27th, 1915, almost a month after it learned of the conditions in the Panama Canal, sent a telegram directly to the Oregon-California Shipping Co. as the special owner of the Steamship Eureka,

demanding a transhipment by the cheapest and quickest route. The telegram referred to was as follows:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Oct. 27, 1915.

Oregon-California Shipping Co.,
Railway Exchange Bldg.,
Portland, Ore.

Our representative Murry Los Angeles advises you wired considering transshiping at New Orleans. If you do this you must protect on our goods same rate as can be obtained by forwarding across Isthmus and up Pacific Ocean. Not only valuable time lost but excessive rates and we demand forwarding via cheapest and quickest route.

NATIONAL CARBON COMPANY.

FB

(Libelant's Exhibit 20, attached to typewritten Transcript of Evidence.)

On November 3rd, 1915, more than month after the appellant learned of the conditions in the Panama Canal Zone, it made another demand directly upon the special owner for information concerning the shipment. This telegram is as follows:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Nov. 3, 1915.

Oregon-California Shipping Co.,
Railway Exchange Bldg.,
Portland, Oregon.

Must have immediate information regarding your intention reference our batteries now on Eureka.

NATIONAL CARBON COMPANY.

FB
(Printed on side)
COPY FOR OUR FILES.

(Libelant's Exhibit 23, attached to typewritten Transcript of Evidence.)

On November 4th, 1915, more than a month after

the appellant learned of the conditions in the Panama Canal Zone and on the very day when the Steamship Eureka set sail for New Orleans, the appellant again made a demand directly upon the special owner for information. This telegram was as follows:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Nov. 4, 1915.

Oregon-California Shipping Co.,
Railway Exchange,
Portland, Oregon.

Some immediate action must be taken to get batteries on Eureka forwarded. Every day's delay means more damage which you must stand. Wire quick your intentions.

NATIONAL CARBON COMPANY.

FB
(Printed on side)
COPY FOR OUR FILES.

(Libelant's Exhibit 25, attached to typewritten Transcript of Evidence.)

On November 5th, 1915, more than one month after the appellant learned of the conditions in the Panama Canal Zone and after the Steamship Eureka had set sail for New Orleans, it made another demand upon the special owner. This demand was contained in the following telegram:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Nov. 5, 1915.

Oregon-California Shipping Co.,
Chas. Kurz, Railway Exchange,
Portland, Oregon.

Owing to delay am afraid batteries on Eureka have deteriorated to such extent cannot be used to general public. Must have option of making test when cargo discharged from Eureka. May find it necessary to return them to factory. Advise when anticipate unloading so can arrange if necessary to be on ground for testing. Hurry disposition.

A. J. Mitchell.

FB
(Printed on side)
COPY FOR OUR FILES.

(Libelant's Exhibit 27, attached to typewritten Transcript of Evidence.)

On October 25, 1915, the appellant wrote a letter to L. Rubelli's Sons from which letter it appears that the appellant while in the offices of L. Rubelli's Sons dictated a communication directly to the Oregon-California Shipping Company, which letter reads as follows:—

NATIONAL CARBON COMPANY

Cleveland, Ohio, U. S. A.

Mark Reply AJM
Oct. 25, 1915.
File

L. Rubelli's Sons & Co.,
Mr. F. W. Davis, Traf. Mgr.,
Pier 16, South Wharves,
Philadelphia, Pa.

My dear Mr. Davis,

In thinking over telegram which was dictated in your office, some way or other it did not appear to cover the situation as I wanted it, so I held it until my return this morning and sent the following telegram:—

"Confirming notice to your agents Rubelli, Philadelphia, in person October 9th, by telephone October 14th, 16th and 19th, and

in person October 22nd and 23rd by our Traffic Manager, A. J. Mitchell, we demand and insist our cargo valued about $15,000.00 on SS Eureka, be transhipped immediately, our expense. Should Eureka containing our cargo proceed via Magellan, we will hold you and owners legally liable for value of goods and damages. Our cargo perishable and worthless unless transhipped immediately and hurried to destination. Considerable damage already accrued by reason your failure to tranship in accordance our instructions October 9th. Have informed Rubelli we will agree to proposition they wired you 14th."

This, I believe, puts it a little stronger than the telegram written when in your office. I do not think any time has been lost, as the telegram left here this morning about ten o'clock, and should reach them at least by nine or ten o'clock, today, and that gives it three hours to be transmitted.

I sincerely hope to hear from you tomorrow in reference to Mr. Kurz having left Philadelphia on his way to Portland, or to the effect that he has been given authority to handle the transaction in the manner he has outlined or sees fit.

In case something new develops in the mor-

ing, please wire me or call me on the long distance telephone so that I may be kept posted.

Thanking you for the kindness shown while in your beautiful little city, and with kindest regards, I am,

Yours very truly,

Anson J. Mitchell,

Traf. Mgr.

(Libelant's Exhibit 70, attached to typewritten Transcript of Evidence.)

It appears from the above letter that the representative of the appellant visited the offices of L. Rubelli's Sons on October 23rd, 1915, and while in their office, dictated a telegram directly to the Oregon-California Shipping Company, the special owner of the Steamship Eureka.

If, as is now contended, the appellant at all times considered that L. Rubelli's Sons were the general agents for the Oregon-California Shipping Company, then why did the appellant deem it necessary to go over the heads of L. Rubelli's Sons and communicate directly with the special owner and dictate this communication in the very office of L. Rubelli's Sons?

In addition to all of the above evidence negativing the claim that L. Rubelli's Sons were the general agents of the Oregon-California Shipping Com-

pany, the following very significant statement appears in the letter last submitted:—

> "I sincerely hope to hear from you tomorrow in reference to Mr. Kurz having left Philadelphia on his way to Portland, or to the effect that he has been given authority to handle the transaction in the manner he has outlined or sees fit."

It must again be recalled that Mr. Kurz, the gentleman just referred to in the last quotation, was the general manager of L. Rubelli's Sons. According to this last quotation, Mr. Kurz was apparently on his way to Portland, Oregon, to interview the special owner of the Steamship with reference to the problems out of which the present controversy arose.

If, however, as is now contended, the appellant considered that L. Rubelli's Sons were the general agents of the Steamship and the special owner, then why did it express itself as late as October 25th, 1915, more than three weeks after its alleged demand for the delivery of its cargo at Colon, as hoping that the general manager of L. Rubelli's Sons would be given authority, "to handle the transaction in the manner he (Kurz) has outlined or sees fit"?

It should likewise be constantly recalled to mind that each of the letters and telegrams above referred to, containing these positive statements negativing the existence of a general agency between L.

Rubelli's Sons and the Oregon-California Shipping Company, together with the statements therein contained negativing the existence of any belief in the mind of the appellant that L. Rubelli's Sons had full authority, "to handle the transaction," were exhibits introduced in evidence by the appellant itself and, therefore, the statements therein contained rise virtually to the dignity of admissions.

Amplifying and augmenting all of the above conclusive admissions, the appellant introduced in evidence a letter bearing date October 22nd, 1915, written by L. Rubelli's Sons in which said firm expressly denies the assumption of any responsibility for the actions of the steamer, her owners, charterers or the Oregon-California Shipping Company or others concerned. This letter in part reads as follows:

> "Our interest in the S. S. "Eureka" and her cargo was merely as agents for the Oregon-California Shipping Company, Inc., of Portland, Oregon, but we feel that the matter of getting these goods to destinations is one in which we should strongly concern ourselves. * * * We make the suggestion without assuming any responsibility whatsoever for the actions of the steamer, her owners, charterers or the Oregon-California Shipping Company, Inc. of Portland, Oregon, or others concerned * *. The above proposition has already been accepted by one of the large interests involved, i. e., the National Carbon Company, of Cleveland, Ohio."

(Excerpt from Libelant's Exhibit 14, attached to typewritten Transcript of Evidence.)

In addition to the statements contained in the letter last quoted denying the existence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Company, the said firm of L. Rubelli's Sons affirmatively state that a proposition presented by them, independently of the special owner of the Steamship, had been accepted by the National Carbon Company of Cleveland, Ohio, the appellant in this case.

If the National Carbon Company had at all times acted on the belief and assumption that L. Rubelli's Sons were the general agents of the Oregon-California Shipping Company and were responsible to the National Carbon Company for the acts of the ship, then why did the appellant enter into this agreement with L. Rubelli's Sons for the purpose of acting independently of the special owner, the Oregon-California Shipping Company?

This very letter, which was introduced by the appellant, and the statements of which are approved and vouched for by the appellant, shows affirmatively that L. Rubelli's Sons directly denied the existence of any responsibility for the acts of the Steamship or its owners, and so advised all of the shippers.

All of the above letters and telegrams which were introduced in evidence by the appellant itself,

establish conclusively that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, the special owner of the vessel, and further establish that the firm of L. Rubelli's Sons was only a limited agent. They likewise establish that the National Carbon Company, the appellant in this case, new, during the full period of the transactions involved in this controversy, that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company.

These letters and telegrams likewise establish that the appellant made many demands directly upon the Oregon-California Shipping Company, the special owner, and these acts, which speak more loudly than the words themselves, establish knowledge on the part of the appellant, that the Oregon-California Shipping Company was the only proper party upon whom to make a demand concerning any of the vital problems arising in connection with the extraordinary happening which gave existence to the present controversy.

It affirmatively appears from these exhibits that the firm of L. Rubelli's Sons denied the existence of any general agency between themselves and the Oregon-California Shipping Company.

It affirmatively appears from these exhibits that the appellant adopted the practice of making important demands upon the Oregon-California Shipping Company directly, thus eliminating any inference

that it considered the firm of L. Rubelli's Sons the proper party upon whom to make such demands.

It affirmatively appears from these exhibits that as late as October 25th, 1915, more than three weeks after the appellant had gained knowledge of the circumstances, it expressed the hope that the general manager of L. Rubelli's Sons would be given authority to handle the transaction.

It affirmatively appears from these exhibits that the appellant sent a communication directly from the offices of L. Rubelli's Sons to the Oregon-California Shipping Company, again eliminating the inference that it at any time considered full authority vested in L. Rubelli's Sons.

It affirmatively appears from these exhibits that as late as October 25th, 1915, the appellant was still demanding of the special owner a transhipment of its cargo, thus eliminating any possible inference that there existed in the minds of the officers of the appellant any idea that the alleged demand for the delivery of the cargo of October 1st, made upon L. Rubelli's Sons was a sufficient demand or one to which the appellant attached any importance.

It affirmatively appears from these exhibits that the appellant negotiated with the firm of L. Rubelli's Sons independently of the special owner of the vessel, which fact again negatives any belief on the part of the appellant that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Company.

It affirmatively appears from the testimony of Mr. Kurz, a witness produced by the appellant itself, that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company and was only a limited agent for the purpose of soliciting cargo.

All of the above allegations appear from the appellant's own evidence. All of the above affirmations are vital admissions on the part of the appellant.

In opposition to all of these admissions, the appellant contended in the court below, and now contends, that a general agency existed between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company. It did not offer, and does not now offer, any direct evidence establishing any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, but contends that the facts disclosed by the record establish a course of dealing from which facts the court should imply a general agency. It further contends that the National Carbon Company was led by such facts to believe that such a general agency existed and relying upon such belief, made the demand upon which the appellant now rests its entire claim.

Upon the trial of this case, the appellant presented to the court as the facts from which it implied such agency the following.

In the first place, it contended that the following letter head appearing on Libelant's Exhibit 85 con-

stituted the first link in the chain of circumstances establishing by inference, a general agency between L. Rubelli's Sons and the Oregon-California Shipping Company. The letter head referred to was as follows:

Atlantic Coast Thru Panama Canal Pacific Coast
O. C.

OREGON-CALIFORNIA SHIPPING CO., INC.

"Quaker Line"

Pier 16, South Wharves
(Foot of Spruce St.)

L. RUBELLI'S SONS
General Agents

Phones:
Bell, Lombard 41-34
Keystone, Main 27-16

Chas. Kurz, General Manager
F. W. Davis, Traffic Manager
R. B. Bates, Ass't Traffic Manager

Philadelphia, Pa., September 4, 1915.

National Carbon Company,
Cleveland, Ohio

Gentlemen:—

Confirming wire of even date we will accept your one car of batteries for Los Angeles and one car for San Francisco on the S. S. "Eureka" at 50c per hundred pounds.

We enclose herein shipping instruction blanks and would ask that you kindly send us instructions promptly together with your railroad bill of lading.

If you can indicate to us the cubic space taken up by these goods would appreciate it very much.

Yours very truly,

R. B. Bates,

Asst. Traffic Manager.

(Libelant's Exhibit 85, attached to typewritten Transcript of Evidence.)

The appellant contended that the designation on the letter head above set forth constituted sufficient evidence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Company to warrant the National Carbon Company in believing that L. Rubelli's Sons had full and unlimited authority to act for the Oregon-California Shipping Company.

The substance of the letter, however, is in accord with the testimony of Mr. Kurz and in accord with the statements contained in the other exhibits above set forth, which establish that L. Rubelli's Sons acted only as agents for the procurement of space.

There was no evidence introduced upon the trial of this case showing that the above letterhead was

used with the knowledge and consent of the Oregon-California Shipping Company. There was no evidence introduced upon the trial of this case showing that the National Carbon Company was misled by the designation appearing upon said letterhead.

The trial court made the following finding in this particular:

> "There is no testimony that libelant was misled by the designation 'General Agents' after the words 'L. Rubelli's Sons' used upon this letterhead, or that the same was so used with the knowledge of the Oregon-California Shipping Company."
>
> (Apostles on Appeal, page 70.)

It cannot, therefore, be properly contended that the above letterhead, standing by itself, affords any basis for an inference of general agency.

There is not only an absence of evidence showing that the appellant was misled by the designation upon this letterhead, but, as already shown above, the affirmative record introduced in evidence by the appellant itself, establishes that no general agency did, in fact, exist between L. Rubelli's Sons and the Oregon-California Shipping Company, and these affirmations preclude the possibility of any inference to the contrary.

The party who established these affirmations should not now be allowed to evade their effect, by

seeking shelter under a claim of inference, much less a claim of inference based upon a naked reference such as the above letterhead, without any showing that the letterhead was misleading to anyone, or that the Oregon-California Shipping Company had any knowledge of its use.

The appellant next contended that the bills of lading for the shipments from Philadelphia were signed by R. B. Bates, Assistant Traffic Manager of L. Rubelli's Sons, and that the bill of lading for the shipment from New York was signed by J. U. English. It contended that J. U. English was an employe of Phelps Bros. & Co., who in turn were the agents of L. Rubelli's Sons.

The appellant argues that the latter facts are evidence of a general agency. As already shown, however, the firm of L. Rubelli's Sons were the agents for the purpose of soliciting space only and for this reason probably authorized Mr. Bates to sign the bill of lading, although the record does not disclose the existence of any such authority. Furthermore the record does not disclose any authority in Phelps Brothers of New York, or any of its employees to execute the bills of lading.

The appellant likewise set forth an excerpt from the testimony of Mr. Kurz, which reads as follows:

> "Well, we did advertise ourselves as general agents in the east of the Oregon-California Shipping Company."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, page 149.)

On the very same page of the evidence, however, appears the further statement of Mr. Kurz that the general agency to which he referred related only to the solicitation of cargo. This statement was as follows:—

A. That is right, that is what we did do, the general agency that I referred to meant that we had charge of the different sub-agents but only as to the solicitation of cargo.

Q. In other words, you at no time held yourself out, and do not now, to have ever been the general agents in the broad general sense of a complete agency for all matters of every kind and nature of the Oregon-California Shipping Co.? A. We were only the general agents in so far as picking up freight was concerned; booking freight.

(Testimony of Mr. Kurz, Libelant's Exhibit 1, page 150.)

It must again be remembered, as already stated, that Mr. Kurz was a witness called by the appellant itself and the appellant vouches for the truthfulness of his statements. His statement as set forth in the last quotation directly negatives the fact of a general agency.

The appellant next contended that the testimony of Mr. Kurz appearing on page 136 of Libelant's Exhibit I, disclosed that L. Rubelli's Sons used the term "Quaker Line" in connection with the steamers that had sailed from Philadelphia to the Pacific Coast, and thus L. Rubelli's Sons must have been general agents of the Oregon-California Shipping Company.

They also referred to the testimony of Mr. Kurz, on page 137, wherein he states that H. M. Williams was president of the H. M. Williams Company, which chartered the Steamship Eureka from the Crossett-Western Lumber Company and that he, Williams, was also general manager of the Oregon-California Shipping Co., to which latter company the Steamship Eureka had been subchartered and contended that this testimony bears the impress of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Co.

The appellant next contended that Libelant's Exhibit 48, which was a letter addressed to President Wilson, making an inquiry as to the possibility of reopening the canal, being a letter written by Mr. Kurz, wherein he stated that L. Rubelli's Sons had inaugurated service between Philadelphia and the West Coast of the United States and that their Steamship Eureka was then held up at the eastern end of the Panama Canal, was further evidence of a general agency.

The appellant next relied upon some statements in Libelant's Exhibit 14, which was a letter signed by

L. Rubelli's Sons and wherein it is stated, that as agents for the Oregon-California Shipping Co. they were in daily touch with the master of the ship, and that therefore a general agency was to be inferred therefrom.

The above references to isolated portions of the evidence and to isolated exhibits, constitute the entire state of facts upon which the appellant asked the trial court and now asks this court to base a legal conclusion of an implied agency.

The references to the record upon which the appellant relies are really more in the nature of inferences than facts and the appellant is virtually asking this court, as it did the trial court, to base an inference upon these inferences and deduce therefrom a legal conclusion, as to the existence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Co.

After reviewing all of these references and all of this testimony and all of these exhibits, the trial court very properly concluded as follows:—

> "There is no evidence of any single instance in which that company (L. Rubelli's Sons) acted upon or settled any disputed or questioned claim against the 'Eureka' or, for that matter, a claim of any kind."

(Apostles on Appeal, page 74.)

The appellant very vigorously challenges the court's conclusion that the record in this case failed to establish any general agency between L. Rubelli's Sons and the Oregon-California Shipping Co. Such a vigorous challenge is necessitated by the fact that the appellant's entire claim is dependent upon the establishment of such an agency.

The record shows that the National Carbon Company was a very extensive shipper and that its traffic manager, Mr. Mitchell, was very familiar with shipping methods (Libelant's Exhibit 1, page 25); and yet with all this knowledge and information, the appellant now admits that it never at any time made a demand upon the master or the officers or the owner of the vessel, but relied solely upon the conversation wherein Mr. Mitchell told the members of the firm of L. Rubelli's Sons, that he would take the cargo over at Colon and pay the cost of discharging same.

The weakness of the appellant's position in this particular and the necessity of establishing the ground work of the claim set forth in its libel, discloses the reason for its excessive earnestness in urging upon this court, that the trial court was in error in finding the absence of any general agency.

The question of the existence or non-existence of an agency is usually a mixed question of law and fact. Technically speaking, the naked proposition of the existence of an agency, is a pure question of fact, while the scope of an agency is a question of law. This distinction is universally recognized and may

be verified by the cases set forth in: Volume 44, Century Digest, under the heading of Principal and Agent, Sections, 724, 726.

The evidence introduced by the appellant upon the trial of this case, however, for the purpose of establishing the general agency in question, between the firm of L. Rubelli's Sons and the Oregon-California Shipping Co., not only establishes affirmatively, the fact of a limited agency; but likewise establishes the scope of such limited agency.

The letter of December 3rd, 1915, addressed by L. Rubelli's Sons to the National Carbon Company states, "that Messrs. Phelps Brothers & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer at New York and Philadelphia for account of the Oregon-California Shipping Co., Inc., at Portland. Neither Messrs. Phelps Brothers & Co., or ourselves had any interest other than in the capacity as agents as above outlined."

The letter of December 8th, from L. Rubelli's Sons to the National Carbon Company re-affirms the declarations contained in the letter of December 3rd.

The letter of January 13th, 1916, from the liquidator of Phelps Brothers & Co. re-afirmed the statements contained in the letter of December 3rd, 1915.

The letter of January 13th, 1915, from Phelps

Brothers & Co. directed to the National Carbon Company, repudiated any authority on behalf of Phelps Brothers & Co. or L. Rubelli's Sons to negotiate for any matters concerning the settlement of claims.

The letter of October 22nd, 1915, addressed by L. Rubelli's Sons to all the shippers repudiated any responsibility whatsoever for the acts of the owners of the Steamship Eureka.

In addition to the above, the appellant introduced in evidence a telegram, reading as follows:

"Philadelphia, Pa., Oct. 16, 1915.

Oregon-California Shipping Company,
Railway Exchange Building,
Portland, Oregon.

You cannot store cargo since you have facilities get goods destination stop goods must be moved without any further delay otherwise will have heavy claims for your not taking prompt action stop will you permit our handling matter basis our wires fourteenth fifteenth wire authority together with full particulars suggested in our various wires stop if you object state objections fully are treating owners Edison Light also other per our wire fifteenth stop dont overlook Luckenbach availed of opportunity transship and that your duty was to act similarly stop will owner Eureka permit discharge cargo Colon or would he allow her proceed Puerto Mexico if we elect stop this is critical matter

and you should give us all information possible promptly to enable proper disposition.

L. Rubelli's Sons."

(Libelant's Exhibit 65.)

The above telegram was another one of the exhibits produced by the appellant itself, and the statements contained in such telegram are, therefore, binding upon the appellant.

It unquestionably appears from the above telegram, that L. Rubelli's Sons were seeking to obtain from the Oregon-California Shipping Company full authority to act in the premises, which absolutely negatives the proposition that they had full authority in the first instance. Furthermore, the above telegram, which is an admission by the appellant itself, proves conclusively that the appellant knew of the limited authority of L. Rubelli's Sons.

The testimony of Mr. Kurz above set forth positively states that L. Rubelli's Sons acted only in the capacity of agents for the solicitation of cargo and never held themselves out as general agents for all purposes.

In the letter of October 25th, 1915, addressed by the appellant to L. Rubelli's Sons, being Libelant's Exhibit 70, the appellant expressed a hope that Mr. Kurz, the general manager of L. Rubelli's Sons, would be given full authority to handle the

transactions in the manner he had outlined or saw fit, thereby establishing knowledge on the part of the National Carbon Company, of the limited scope of the agency which existed between L. Rubelli's Sons and the Oregon-California Shipping Co.

These letters and telegrams were introduced in evidence by the appellant itself and the appellant is bound thereby. The testimony of Mr. Kurz is the the testimony of a witness placed on the stand by the appellant and the appellant thereby vouches for the correctness and accuracy of such statements.

It thus follows in the case at bar, that the court is not only not called upon to determine the fact of a limited agency between L. Rubelli's Sons and the Oregon-California Shipping Co., but is not even called upon to determine the scope of such limited agency, because that very scope is established by the appellant's own evidence.

This positive testimony and these affirmative assertions, introduced in evidence and vouched for by the appellant itself, overcome in a most powerful manner the meager inferences which the appellant attempts to deduce from the isolated excerpts of testimony and the remote written statements upon which it relies.

The existence or non-existence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Co., becomes virtually a question of fact to be determined from the circumstances of this particular case, because, as already shown, the

fact of a limited agency and the extent of its limit, is established by the evidence itself.

Indeed, the question of a general agency is, as a rule, a matter to be determined from the peculiar facts of each particular case; but in addition to this, there is a rule of law which entirely overthrows the appellant's contention that the alleged general agency in the case at bar can be inferred from the isolated letter head of the Oregon-California Shipping Company, on the face of which appears the name of L. Rubelli's Sons as general agents, and from the letters and telegrams passing between the master of the ship and L. Rubelli's Sons.

In none of these letters and telegrams, to which the appellant refers, does there appear any statement, that L. Rubelli's Sons ever at any time exercised any authority over the Steamship Eureka or on behalf of the Oregon-California Shipping Company, analogous in character to the authority which would have been required in conforming to a demand for the delivery of the appellant's cargo at Colon. In other words, as stated by the lower court in its decision:—

> "There is no evidence of any single instance in which that company (L. Rubelli's Sons) acted upon or settled any disputed or questioned claim against the Eureka, or for that matter, a claim of any kind."

It is a well settled rule of law that any effort to establish an agency by inference, must be accom-

panied by a showing that the authority sought to be implied is of the same general character as the authority established by the facts upon which the inference is based.

This rule of law was announced by the Supreme Court of the state of Maine in the case of Stratton vs. Todd, 82 Me. 149, 19 Atlantic, 111. This was a case wherein the plaintiff sought to recover the value of services for driving logs. The plaintiff claimed that a man by the name of Mason, the agent of the defendant Todd, had agreed to pay the plaintiff for driving the logs. Mason's authority as agent was denied. It became incumbent upon the plaintiff to prove Mason's authority. The evidence showed that Mason had the agency in regard to the logs, but that it was confined to the disposal of them after they had been driven to the boom. The claim in suit was for driving them above the boom. The plaintiff contended that an implied agency existed, because the defendant had held out Mason as his agent. The court after finding that the agency between the defendant and Mason was confined to the disposal of the logs after they reached the boom, concluded as follows:—

> "Mason had an agency in regard to the logs, but it was confined to the disposal of them after they had been driven to the Penobscot boom. The claim in suit is for driving them above the boom. The duties and responsibilities of these two positions are so different that proof of an agency in one will have no tendency to show that

it exists in the other. Hazeltine v. Miller, 44 Me. 177. Besides, the case shows that, for all work to be done above the boom, Foster J. Tracy had the sole responsibility and control, by virtue of a written contract with the defendants.

Nor are the plaintiffs any more successful in relation to the other branch of their case. True it is that if the defendants have by their words or acts held out Mason as their general agent in respect to these logs, or in respect to this particular transaction, they might be estopped from denying such agency after the plaintiffs had in good faith acted upon such representations. But it is not pretended that the defendants have personally made any such representations. The most that is claimed is that Mason has performed certain acts in regard to the logs, which have been recognized as valid by the defendants. 'But the acts from which authority to do a specific act can be implied must be of the same general character and effect.' Hazeltine v. Miller, supra. It will be found on examination of the testimony that the acts relied upon to sustain this inference, with perhaps one exception, are such as pertain to the disposal of the logs after their arrival at the boom, and were within the acknowledged agency of Mason. As already seen, they were not of the same 'general character and effect' as making a contract for driving the logs above the boom. The single exception, that of the contract for driving in 1885, was founded upon a special

authority obtained for that purpose, and is not sufficient to prove a general, or any, custom, such as is necessary to authorize the inference of general authority."

(Stratton vs. Todd, 82 Me. 149, 19 Atlantic, 111.)

The record in this case discloses that L. Rubelli's Sons were the limited agents of the Oregon-California Shipping Company, for the purpose of soliciting cargo only. There is a vast difference between the duties and responsibilities of an agent who merely solicits cargo, and one who has authority to receive a demand for the premature delivery of a cargo, under such extraordinary conditions, as confronted the Steamship "Eureka" in the present case.

There has not been a scintilla of evidence introduced on the trial of this case, for the purpose of showing that the owners of the Steamship "Eureka" ever made any representations with reference to the general authority of L. Rubelli's Sons.

In the very language of the case just cited, the most that can be claimed is that L. Rubelli's Sons performed certain acts in regard to the cargo, which have been recognized as valid by the Steamship "Eureka" and its special owner, but the evidence fails absolutely to establish that the firm of L. Rubelli's Sons ever "acted upon or settled any disputed or questioned claim against the 'Eureka', or for that

matter, a claim of any kind." (Decision of trial court, page 74, Apostles on Appeal.)

Therefore, there is no proof of any single act involving the exercise of any authority by L. Rubelli's Sons, similar to the authority required to conform to the alleged demand for the delivery of the cargo at the port of Colon.

The same court in the decision of **Hazeltine vs. Miller, 44 Me. 177,** reiterated the rule announced, in the following language:

> "No rule of law is better established, or more universally recognized, than that the authority of an agent to act for, and bind, his principal, will be implied from the fact that such agent has been accustomed to performing acts of the same general character for that principal with his knowledge and assent. Nor is it necessary in order to constitute a general agent, that he should have done before an act, the same in specie with that in question. If he have usually done things of the same general character and effect, with the assent of his principal, that is enough. Thus it was held in Bank of Lake Erie vs. Norton, 1 Hill R. 502, where by the articles of co-partnership, one Norton was created agent of a firm, but his authority as thereby defined did not extend to accommodation acceptances. It was proved, however, that he was the general agent of the firm, and, with their knowledge and assent, was in the habit of drawing

bills and making notes and indorsements for them; though the specific act of acceptance was not mentioned in the evidence, as one that had been usually done, the court decided that his general power and the usage of putting the firm name to commercial paper, in all other shapes, was the same thing in substance, and calculated to raise an inference in the public mind that he had such a power.

But the acts from which the authority to do a specific act can be implied must be of the same general character and effect. * * *

In the case at bar, the evidence shows satisfactorily that W. R. Miller was an agent for the defendant. That in that capacity he carried on his mills at the mouth of the Piscataquis; that he had paid the taxes on the defendant's property; that he gave permits for cutting timber on the defendant's land in Howland and Edinburgh, and collected the stumpage therefor; that he settled and received pay for lumber cut upon the defendant's land without authority. There was also evidence that on one occasion he gave a note to the town of Howland as the agent of the defendant. There is no evidence, however, that he had any authority to give the note, or that the defendant had any knowledge of its existence until long after it was given, or that he has ever recognized it as a valid note against him.

Now there is a wide distinction between authority in an agent to carry on mills for the owner; to permit parties to cut timber on his lands, and collect stumpage therefor; to claim indemnity from trespassers, and authority to enter into contracts for carrying on lumber operations, by which the principal was to be obligated to pay large sums of money. In the one case, the agent would be, in different modes, collecting for his principal money arising from the use or proceeds of the sale of his property; in the other, he would be embarking that principal in business enterprises which might involve large pecuniary liabilities and losses. Authority to embark in enterprises of the latter description could not be implied from an admitted agency with authority to perform acts of the former character.

As to the testimony of the witness, Muzzey, taken in connection with the letter of the defendant, it restricts, rather than enlarges, the authority of W. R. Miller as the defendant. No implication of authority to enter into the contract in question can arise from that transaction."

(Hazeltine vs. Miller, 44 Me. 177, 179-181.)

There has been no evidence introduced upon the trial of this case to show that the defendant or the special owners of the Steamship "Eureka" ever at any time had knowledge of the alleged demand made

upon L. Rubelli's Sons, for a delivery of the cargo at the port of Colon, or that they ever recognized or ratified the alleged refusal or non-refusal of L. Rubelli's Sons to deliver, or not deliver, the cargo in question, on the demand of the appellant.

As already stated above, there is a wide distinction between the authority necessary to solicit cargo, and the authority necessary to conform to a demand for the premature delivery of a cargo.

In the solicitation of cargo, L. Rubelli's Sons would be, in fact, collecting money for the Oregon-California Shipping Company, and would, in fact, be aiding the shippers in procuring space on the Steamship "Eureka."

In conforming to the alleged demand made upon L. Rubelli's Sons at the port of Colon, for the delivery of the cargo, they would be embarking the Oregon-California Shipping Company into an entirely new phase of financial liability, which arose on account of the extraordinary and unexpected contingencies created by the slides in the Panama Canal, which contingencies were neither in the minds of L. Rubelli's Sons nor of the Oregon-California Shipping Company at the time when L. Rubelli's Sons solicited the space for the cargo of the appellant.

We, therefore, respectfully submit that the ruling of the trial court upon the question of the alleged general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company was a correct ruling. The ruling is correct, not only as a

proposition of general law, but likewise in the application of such proposition of general law to the particular facts of the case at bar.

The importance of the ruling as applied to this particular case cannot be over-estimated. The extraordinary happening which gave rise to the facts constituting the present controversy, imposed upon the Steamship "Eureka" and her special owner a very difficult situation; and if the appellant seeks to impose a liability arising out of this extremely difficult situation, the appellant should, itself, be held strictly accountable for its own acts and conduct.

If, as is now contended, the appellant really desired a delivery of its cargo at the port of Colon, then certainly it should have made some effort to advise either the Master of the ship or the special owner of the ship of its desires in this regard, and not hope to be allowed to create so vast a liability on the basis of the meager conversation which took place between its Traffic Manager, Mr. Anson J. Mitchell, and the various members of the firm of L. Rubelli's Sons, in Philadelphia, Pa.

It should not be allowed to come into this court, or any other court, and establish a claim of $10,000.00, by attempting to construe such a conversation into a legal demand, in the absence of any showing whatsoever of any effort to make such demand either upon the special owner or the master, or to establish that knowledge of such demand, if the

same was made, was conveyed either to the special owner or the Master.

Instead of this, it has presented to this court a record composed of letters and telegrams introduced by itself, and by which it is bound, showing that the firm of L. Rubelli's Sons expressly denied in writing the existence of any general agency between itself and the Oregon-Cailfornia Shipping Company, which letters and telegrams specifically and affirmatively state that the agency existing between L. Rubelli's Sons and the Oregon-California Shipping Company was a limited agency, limiting the authority of L. Rubelli's Sons to the sole task of providing space for cargo on the Steamship "Eureka."

In addition to this, they have introduced the testimony of Mr. Charles Kurz, a witness on behalf of the appellant itself, in which he affirmatively states that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, and was the agent of the Oregon-California Shipping Company and the Steamship "Eureka" for the purpose only, of providing space for cargo thereon.

Augmenting these letters and these telegrams, introduced by the appellant itself; augmenting their affirmations, which show the absence of any general agency between L. Rubelli's Sons and the Oregon-California Shipping Company; augmenting the testimony of Mr. Charles Kurz, their own witness to the effect that no general agency existed between L. Rubelli's Sons and the Oregon-California Ship-

ping Company; the appellant likewise introduced a telegram, sent by itself to the Oregon-California Shipping Company on October 25th, 1915, more than three weeks following the date upon which it claims to have made a demand for the delivery of its cargo at Colon, in which telegram it demanded that the Oregon-California Shipping Company, the special owner of the "Eureka" tranship its cargo immediately, which demand negatives the contention which it now makes that it desired not to have its cargo transhiped, but desired to have it delivered at the port of Colon.

Furthermore, if on October 1st, 1915, the National Carbon Company did make a demand upon L. Rubelli's Sons for a delivery of its cargo at the port of Colon, which alleged demand constitutes the fundamental basis of this entire controversy, and such demand was made upon the firm of L. Rubelli's Sons by the appellant, acting in the belief that they were the general agents of the Oregon-California Shipping Company, then why on October 25th, 1915, more than three weeks after the first alleged demand, did the National Carbon Company make a lesser demand directly upon the owner, while all the time it believed that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Company, and the proper party upon whom to make a demand?

Certainly, the demand for the transhipment made in the telegram of October 25th is a far lesser demand than the demand for a delivery of the cargo

at the port of Colon, because it is not charged that the act of the Oregon-California Shipping Company in transhipping the cargo in question at the expense of the National Carbon Company was any breach of contract, upon which a claim could arise in favor of the National Carbon Company, and, therefore, such demand was a far less important demand then the alleged demand for the delivery of its cargo at the port of Colon.

It necessarily follows that if the National Carbon Company acted under the belief that L. Rubelli's Sons were the general agents of the Oregon-California Shipping Company, and were the proper parties upon whom to make a demand, then it would have made the demand for the transhipment of the cargo, upon the firm of L. Rubelli's Sons, instead of upon the owner.

It likewise follows that if the National Carbon Company had at all times considered that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Company, and the proper party upon whom to make important demands, it would not have made the demand of October 25th, 1915, for a transhipment of its cargo directly upon the owner instead of upon L. Rubelli's Sons.

Furthermore, if on October 1st, 1915, the National Carbon Company had in truth and in fact made any demand whatsoever for the delivery of its cargo at the port of Colon, and, as alleged in its libel, had notified the supposed agents of the perishable

character of the cargo, and of the further fact that if the cargo was not delivered to it on October 1st, 1915, that such cargo would be a total loss, then it certainly would not have been demanding on October 25th, 1915, more than three weeks thereafter, that its cargo, which on its own theory would by that time have become a total loss, be transhipped at its own expense.

In addition to all this, the National Carbon Company, itself, through its Traffic Manager, Anson J. Mitchell, who was its star witness in the present case, did on October 25th, 1915, address a letter to the firm of L. Rubelli's Sons, in which it expressed the hope that Mr. Kurz, who was the general manager of L. Rubelli's Sons, would be given authority by the Oregon-California Shipping Company to handle the transaction as he had outlined or as he saw fit. The language of this letter was as follows:

> "I sincerely hope to hear from you tomorrow in reference to Mr. Kurz having left Philadelphia on his way to Portland, or to the effect that he has been given authority to handle the transaction in the manner he has outlined, or sees fit."
>
> (Libellant's Exhibit 70).

If at all times during the transactions involved in the present controversy, the appellant had considered that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Com-

pany, and on October 1st, 1915, it further considered that the firm of L. Rubelli's Sons had sufficient authority, as agents of the Oregon-California Shipping Company, to authorize the premature delivery of its cargo to it at the port of Colon in response to its demand, then why on October 25th, 1915, more than three weeks after this alleged demand, did it write a letter expressing the hope that Mr. Kurz, the General Manager of L. Rubelli's Sons, would be given authority from the alleged principal, to handle this transaction in the manner he saw fit, and then introduce this admission in evidence upon the trial of this case?

Corroborating all of this direct testimony introduced by the appellant itself, showing the non-existance of any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, Mr. Anson J. Mitchell, the traffic manager of the appellant himself, admitted that he had at no time been to Colon, and had no definite arrangements, whatsoever, for the transhipment or re-handling of its cargo at the time of the alleged demand for its delivery at the port of Colon.

The above constitutes the affirmative record in this case, which is the appellant's own record disputing the existence of any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, and disputing the present assertion of the appellant that the firm of L. Rubelli's Sons was the proper party upon whom to make so important a demand as the alleged demand for the premature delivery of its cargo at the port of Colon.

Amplifying this affirmative record, we likewise have the record of the appellant itself, which fails to offer proof of any fact showing the exercise of any authority by the firm of L. Rubelli's Sons in the interest of the Oregon-California Shipping Company, analogous in character to the authority required to conform to the alleged demand made at the port of Colon; and under the principles of law above cited, no such general agency can be implied from a record which fails to show that the alleged agent had on prior occasions exercised authority of a character similar to that sought to be implied.

This same record likewise establishes the nature of the authority which was in fact exercised by the firm of L. Rubelli's Sons, and this authority which is shown to have been authority to solicit space for cargo on the Steamship "Eureka" is so vastly different from the authority necessary to conform to a demand for the delivery of cargo, that there is not even the remotest analogy or similarity in the nature of the acts.

To hold in the face of such a record that the appellant in this case would be justified in implying so vast and vital an authority on the part of L. Rubelli's Sons, would be to impose a liability upon the steamship and its owners without any foundation either in fact or in law.

The cases relied upon by counsel for the appellant, in support of the rule that a principal is bound by the apparent authority which he invests in an

agent, thereby inducing third parties to rely thereon, have no applicability to a case where the affirmative record shows the absence of any actual authority in the first instance, much less to a case where the record establishes that the third party itself had full knowledge of the limited scope of the alleged agency.

We, therefore, respectfully submit that the decision of the trial court, finding the absence of any express general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, is in exact accord with the facts of the case as established by the evidence adduced upon the part of the National Carbon Company.

We likewise respectfully submit that the findings of the trial court upon the question of the absence of any facts sufficient to support an implied general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company are likewise amply supported by the record in this case, and further submit that the conclusions of law made by the trial court inevitably follow from such findings.

Turning now from the question of an alleged agency between the firm of L. Rubelli's Sons and the National Carbon Company to the single question of the alleged demand made upon the alleged agents of the National Carbon Company for a delivery of its cargo at the port of Colon, we contend that such a demand, although made upon the principal itself, would be insufficient to support any legal liability against the Steamship "Eureka" for damage to the

cargo in question, and further contend that the alleged demand established by the appellant's own record was, in point of law, an insufficient demand.

The appellant rested its entire claim upon the single case of the "The Martha," reported in Volume 35 of the Federal Reports, page 314. This was a case decided by the United States District Court, for the Eastern District of New York. An effort to trace the history of this case fails to disclose that the same was ever appealed from, modified, or commented upon in any decision of the Appellate Courts.

The case, therefore, stands as a single instance case, and offers no criterion by way of any well recognized or established principle, other than the general principle that the action of a Master, in reference to immediate and extraordinary exigencies which may confront the ship, must be determined in the light of the rule of reason.

Furthermore, the facts involved in the case of "The Martha" are entirely distinguishable from the facts involved in the case at bar.

It appears from a reading of the facts of the case, that "The Martha" was bound from the port of Havre, France, to the port of New York, and was compelled to put into Halifax on account of needed repairs. It further appears that in order to successfully accomplish these repairs, the parts would have had to be obtained from Europe. It further appears, and the court found as a matter of fact, that

in the month of October it became known to all parties, that the repairs would not be completed until February. In view of this situation, one of the consignees made a demand for the delivery of its freight at Halifax, and offered to pay all expenses incident thereto, and to sign an average bond. This demand, the ship owner himself refused, and the court held that such refusal was "without a reasonable excuse", and, therefore, held the ship liable in damages for its action.

It thus appears from a mere reading of the case, that the liability established by the decision in the case of "The Martha" was based on three propositions, to-wit:

FIRST: It was definitely known that the ship would be detained in the port of Halifax from October to February—a period of approximately four months.

SECOND: In view of this situation, the refusal to deliver the goods was without a reasonable excuse.

THIRD: The shipper accompanied his demand with an offer to pay all expenses of discharging the cargo, and in addition to this, tendered an average bond to protect the ship owner against all claims which might arise from other shippers by virtue of disturbing their cargo.

The facts established by the evidence introduced upon the trial of the case at bar are so utterly different from the facts presented to the court in the case of "The Martha", that the only points of analogy between the two cases are—that "The Martha" was a steamship, and that the "Eureka" was a steamship; that each steamship had a cargo; that the voyage of each was interrupted by an unforseen delay, and that the word "demand" appears in each of the cases.

In the case at bar, the steamship "Eureka" set sail from New York with a mixed cargo on board, destined for Pacific Coast ports. The route prescribed by the bills of lading was through the Panama Canal. When the ship reached the Atlantic entrance to the Panama Canal, the master found that he could not continue his voyage on account of a temporary obstruction in the form of slides.

The situation which confronted the master was a serious situation. He found himself in the possession of a ship laden with a valuable cargo, and confronted with one of those exigencies which it is difficult to anticipate. It was likewise one of those exigencies which it is extremely difficult to appreciate.

He was confronted with the possibility that the Canal might open at any time, and in no event could he determine, or even approximate, the possible period of delay.

In the case of "The Martha," upon which the appellant so strongly relies, the period of delay became fixed as soon as it was ascertained that parts

would have to be procured from Europe. In other words, the master of the ship, and the owners of the ship, knew in October that the repairs could not be accomplished until February.

In the case at bar, the delay caused by the temporary obstruction in the Panama Canal, could not even be estimated, and under such circumstances it has been held, that it is the duty of a master to wait until definite information can be obtained. See the case of **Hand v. Baynes, 4 Wharton. 204, 33 Am. Dec. 54, 55, 56, infra.**

The evidence introduced upon the trial of this case by the appellant, shows that every possible effort was made to ascertain from the Government the approximate date of the reopening of the canal.

It appears that on October 4th, the master of the ship wired, to the effect, that he had arrived on September 28th and expected to be able to leave October 10th, although he was unable to ascertain any further information as to the reopening. This appears from libelant's Exhibit 43-A.

On October 8th a letter was addressed to the President of the United States, asking for definite information concerning the reopening of the Canal. This appears from libelant's Exhibit 48.

On October 9th, the Captain of the steamship was informed that steamships of a 30 foot draft would be able to pass through the Canal by November 1st, at least. This appears from Libelant's Exhibit 49.

On October 11th, the master of the ship was advised that the Canal would probably be opened by November 1st, although the obtaining of positive information was at that time almost impossible. This appears from Libelant's Exhibit 53.

On October 11th, a day letter was sent to the Chief of Office of the Panama Canal, requesting information as to its reopening. This appears from Libelant's Exhibit 55.

On October 12th, information was sent out by the Panama Canal office to the effect that the prediction of the approximate date of the reopening of the Panama Canal would be given out as soon as sufficient material was removed to insure stable conditions. This appears from Libelant's Exhibit 56.

On October 11th, a circular letter was sent out by the Panama Canal office to the Chief of the Corps of Engineers to the effect that they were not fully informed as to the date of reopening, but would furnish information as soon as it could be obtained. This appears from Libelant's Exhibits 57 and 57-A.

On October 14th, another circular letter was sent out by the Panama Canal office suggesting the impossibility of giving any definite information regarding the reopening of the Canal. This appears from Libelant's Exhibit 62-A.

On October 13th, a circular letter was sent out by the Engineering Department of the United States Government, stating that the date of reopening the

Canal was still a question of doubt, and that the possibility of ships of 30 foot draft passing through depended on conditions when slides were removed. This is established by Libelant's Exhibit 62-C.

On October 15th, 1915, the master of the ship sent a cablegram, advising that the Canal would probably not open before January 1st, and that the ascertainment of definite information was impossible. This is shown by Libelant's Exhibit 63.

It thus appears that the master waited from the 28th day of September until the 15th day of October, relying upon advices which he constantly received from the United States Government that the slides would probably be removed within a reasonable period of time. These facts all appear from the evidence introduced by the appellant upon the trial of this controversy.

Beginning on the 15th day of October, 1915, when the master finally determined that no definite information concerning the reopening of the Canal could be had, efforts were made on behalf of the steamship "Eureka" to procure a method of transhiping the cargo.

The testimony of Mr. Kurz, one of the witnesses called on behalf of the appellant, was to the effect that after it was ascertained that the probability of the reopening of the Canal was very uncertain, efforts were made on behalf of the Oregon-California Shipping Company to find a method of transhipping

the cargo, and that such efforts continued up until about November 1st, 1915.

The witness further testified that the Government would not permit the unloading of vessels unless definite arrangements had been made for transhipment. The testimony in this particular pointed out the various lines with which the negotiations were taken up, and was in the following language:

"Q. Mr. Kurz, when the slide at the Canal continued after the arrival of the vessel for some little time, it is a fact, is it not, that your firm as well as the Oregon-California Shipping Co. at Portland made a thorough investigation of all possible and practicable methods of dispatching the boat or cargo to the points of destination?

Same objection.

A. Our firm did, I don't know what the people on the Pacific Coast did.

Same motion.

Q. Now, in addition to the disclosures as to those efforts made by your firm, as shown by the exhibits heretofore put in evidence, by the libelant, your firm endeavored to arrange transshipment across the Canal and transportation up the west coast with other carriers, did it not?

A. Yes.

Q. Among others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Steamship Company, the Panama Pacific Line at New York, the owners of the Edison Line at Boston, the Alaska Steamship Company and Olsen & Mahoney?

A. Yes.

MR. WELLES: Objected to, and I move that the question and answer of the witness with respect to what was done for the forwarding of cargo other than libelant's be stricken out on the ground that it is incompetent, irrelevant and immaterial under the issues in this case.

Q. And as to your efforts with all of the transportation companies named in the last question as well as those named in the various exhibits placed in evidence by the libelant, you were unable to arrange for the forwarding of the cargo by rail either across the Isthmus or via the Tehuantepec Railroad because of the lack of carriers on the Pacific Coast to take the goods at the point of discharge on the Pacific side?

A. That is right, up to the time I got to Portland.

BY MR. WELLES:

Q. When did you get to Portland?

A. I arrived at Portland about November 1st.

Q. You were there only four or five days before the vessel came back?

A. Yes.

BY MR. PLATT:

Q. In addition to the efforts to arrange the transshipment of the cargo across the Isthmus and up the west coast, which proved impossible, for the reasons that you have already stated, investigation was made as to the taking of the vessel and cargo to the west coast through the Straits of Magellan, was there not?

A. Yes, sir.

Q. And the same had to be abandoned, is it not a fact, because being an oil burner there was no supply of fuel oil on the east or west coast of South America to make it safe for her to make the trip?

A. That is right.

Q. It is a fact, is it not, that the government would not permit the unloading of vessels de-

tained at the canal either on the west coast or the east coast unless the parties so unloading had definite arrangements made and carriers ready to take the cargoes when so unloaded?

MR. WELLES: Objected to as incompetent, irrelevant and immaterial, consisting merely of hearsay.

A. It is."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, pages 142, 143, 144, 145.)

It thus appears from the evidence introduced by the appellant itself, that from the 15th day of October until the 1st of November, every possible effort was made to find some means for transhipping the cargo of the "Eureka" across the Isthmus of Panama, and that such efforts were futile; and it further appears that the Government prohibited the discharge of cargo at these points unless some definite arrangements had been made for transhipment.

It must be remembered that these statements were made by Mr. Kurz as a witness on behalf of the appellant, and that, therefore, the appellant vouches for the correctness and truth of the assertions.

In spite of all these facts, the appellant now comes forward and asserts that the delay during this period of time, caused by an unavoidable obstruction and an unforeseen contingency, was an unreason-

able delay, and attempts to draw an analogy between the case at bar and the case of "The Martha", where the delay of almost four months was a fact known to the master and to the ship, at the time when she put in to the port of Halifax. It likewise attempts to aggravate the situation by claiming that a demand was made for the delivery of its cargo during this period of time, and that the alleged refusal to deliver was without reasonable excuse, and, therefore, imposed a liability upon the ship.

The alleged demand made for the cargo in question rests upon evidence which is very weak, if not, suspicious.

When Mr. Mitchell, the General Agent of the National Carbon Company, was upon the witness stand, his attention was called to Libelant's Exhibit No. 11, which was a telegram from L. Rubelli's Sons to the National Carbon Company, advising it in response to an inquiry, that the "Eureka" was at the Atlantic entrance to the Panama Canal. This telegram was dated October 2nd, 1915.

After identifying this telegram, and acknowledging the information therein contained, Mr. Mitchell was then asked what was done by him in connection with the shipment in question, to which he replied as follows:

"Q. On receipt of this telegram of October 2nd what did you do, Mr. Mitchell?

A. We did nothing until October 8th, then I

came to New York and interviewed Phelps Brothers & Company.

Q. Who are Phelps Brothers & Company?

A. New York agents of Rubelli's Sons, act as agents for the Oregon-California Shipping Company.

Q. Are they the agents of this vessel?

A. Yes. After leaving New York I went to Philadelphia and interviewed Mr. Kurz, Mr. Davis and Mr. Bates.

Q. Who was Mr. Bates.

A. Mr. Bates, as I understand, is agent representing the Oregon-California Shipping Company at Philadelphia.

Q. How do you understand he is agent?

A. By signatures to the bills of lading, and also by his saying so.

Q. Who is Mr. Davis?

A. Mr. Davis, I understand, is general freight agent and represents Mr. Kurz of Rubelli's Sons, who are acting as agents for the Oregon-California Shipping Company at Philadelphia.

Q. Are these gentlemen all agents of the

S. S. "Eureka" and her charterers, the Oregon-California Shipping Co.?

A. That was my understanding.

Q. How did you get that understanding?

A. From conversations with these gentlemen and also from signatures to the bill of lading offered in evidence.

Q. Did they all tell you they were agents of the company?

A. Yes.

Q. More than once?

A. At various times.

Q. Were they engaged in the business of the ship and its cargo?

A. Yes.

Q. They conducted negotiations with you in respect to that?

A. They did.

Q. Did they have negotiations with you with respect to the forwarding of this cargo?

A. They did.

Q. After there was delay in transmission?

A. Yes, sir.

Q. Now, on or about October 9th, when you saw these gentlemen in Philadelphia, what took place?

A. I explained to them the detail and character of the goods, and at that time we went into the question as to whether or not it would be advisable, or whether we could take the goods out of the ship. They called their foreman upstairs, and he brought up the loading sheet,—I presume they call it that, I don't know the technical name—but the loading sheet showing where the goods which had been received at Philadelphia had been loaded, in what part of the boat, and I asked for the approximate expense to unload these barrels. I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time.

Q. You made a demand for the delivery of the goods at Colon at that time?

A. I did.

Q. What did you explain to them was the nature of these goods?

A. I told them that the nature of a dry battery is that after we ship a battery we are supposed to impress upon our people and all dealers that after 90 days or approximately thereto the life of a cell deteriorates or the cell itself deteriorates, and that we would guarantee our batteries to be as good 90 days from the date of shipment as the date of shipment, and we would stand back of and replace any batteries which went bad in that time. Also told them that heat would affect the batteries to such an extent that they would deteriorate very much faster than if kept in a cool place."

"Q. Were these goods delivered to you, in response to your request made to these agents at Philadelphia, at Colon?

A. No, they were not.

Q. Did they refuse to deliver them?

A. They did.

Q. Why did you want the goods at Colon at that time?

A. In order to save any damage that might happen to the goods and because we needed the goods badly in order to ship our customer's orders.

Q. Did you expect to use them at Colon?

A. Either to transship them to San Francisco or back to New York or Jersey City."

(Testimony of Mr. Anson J. Mitchell, Libelants Exhibit 1, pages 17 to 23 inclusive.)

On cross-examination, however, Mr. Mitchell testified that he was never at Colon, and further testified that he had made no definite arrangements for any transhipment of the cargo at this point. His testimony in this particular was as follows:

"Q. Were you ever at Colon?

A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the libelant to handle that portion of the cargo of the S. S. Eureka which was shipped by the National Carbon Company, during any time that the steamship Eureka was detained at the east side of the Panama Canal?

MR. WELLES: Objected to as incompe-

tent, irrelevant and immaterial upon the issues in this action.

A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, the American Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.

Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at any time during the time that the Eureka was detained at Colon, on the east side of the Panama Canal, for the handling of that portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes.

Q. Did the National Carbon Company address any direct communications at any time while the Eureka was detained at Colon, at the eastern entrance to the Panama Canal, to the ship or to the captain of the ship, in charge thereof?

A. No."

(Testimony of Mr. Anson J. Mitchell, Libelant's Exhibit 1, pages 185, 186.)

In addition to this testimony of Mr. Mitchell, the libelant offered the testimony of Mr. Kurz, for the purpose of showing a demand for the delivery of the cargo. The testimony was as follows:

"Q. Did he have any discussion with you then relating to these shipments?

A. He did.

Q. At that time did he offer to pay the expenses of unloading this cargo and landing the same at Colon?

A. He did.

Q. Did he call upon you subsequently to that at Philadelphia, about October 23rd?

A. He did.

Q. Did he at that time repeat his offer?

Same objection. Same exception.

A. He did.

Q. Did he offer at that time to pay all costs and expenses of unloading and landing the goods at Colon?

A. He did.

Q. Did he tell you at both of these times that these goods would be greatly damaged if they were not unloaded immediately at Colon?

Same objection and exception.

A. He did."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, pages 138-139.)

On cross-examination, Mr. Kurz further testified as follows:

"Q. As I understood your testimony on your direct examination, at the various interviews had with Mr. Mitchell, Traffic Manager of the National Carbon Company, in Philadelphia in October, 1915, with reference to the disposition of that portion of the cargo of the steamship Eureka in which he was interested, it was in the nature of a discussion as to what was best to be done and what could be done and what should be done with his portion of the cargo, but that there was no demand made upon you for the delivery of this cargo at the Canal Zone?

A. Mr. Mitchell, of the National Carbon Company, came on to Philadelphia and advised me that his goods were perishable and that some arrangement had to be made immediately to get the cargo to its destination or to bring it back to

Philadelphia or New York, and advised me that if we would not make such arrangements that he was ready to take delivery of his goods at Colon, pay for the expense of discharging his goods, as well as such other goods as had to be discharged to get at his goods, and pay for the reloading of the other goods on board."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, page 145.)

The above was all the evidence introduced by the appellant upon the trial of this case to show the making of an alleged demand for the delivery of its cargo at Colon.

It appears from the testimony of Mr. Mitchell that he was never at Colon, and it likewise appears from the testimony of Mr. Mitchell, that he never made any demand upon the master of the ship, or upon the owners, for a delivery of appellant's cargo.

It must further be remembered that Mr. Kurz was a member of the firm of L. Rubelli's Sons, which it is claimed for the purpose of this demand, was the General Agent of the Oregon-California Shipping Company; but there is not a single utterance in this record, and not a scratch of the pen, to show that this demand, alleged to have been made upon Mr. Kurz or the other members of L. Rubelli's Sons, was ever conveyed to the Oregon-California Shipping Company, or the master of the ship.

It further appears from the admitted facts established by the appellant upon the trial of this case, that as late as October 25th, 1915, it made a demand upon the Oregon-California Shipping Company for a transhipment of its cargo.

If the appellant considered it necessary to make a written demand upon the Oregon-California Shipping Company for a transhipment of its cargo, why did it not likewise make the alleged demand for the delivery of its cargo in writing?

The demand for the delivery of this cargo, is now made the basis for this entire litigation, and yet the alleged demand was considered of so little consequence at the time it was made, that there was not a single record of any kind kept or made of such demand, and it is now claimed that the demand was made orally, not upon the master or upon the owner, but upon the agent, who finally appeared as a witness in this case, on behalf of the appellant itself.

Furthermore, on November 3rd, 1915, the National Carbon Company addressed a telegram directly to the Oregon-California Shipping Company, demanding information concerning the batteries on the "Eureka". This demand was introduced in evidence marked 'Libelant's Exhibit 23."

If the appellant considered it necessary to make such a demand upon the principal, and in writing, how can it now explain that it did not deem it necessary to make the demand, which was to become the

basis of this entire action, in writing, and upon the owner?

Again, on November 5th, 1915, the National Carbon Company made a demand upon the Oregon-California Shipping Company and Mr. Chas. Kurz, demanding that it have the option of testing the cargo when the same was discharged from the "Eureka". This demand was introduced in evidence marked "Libelant's Exhibit 27."

The appellant evidently considered that a demand of this character should be made upon the principal, and should be made in writing. Is it logical to suppose that if it actually did make a demand for the delivery of the cargo at Colon, that it would have failed to have made so important a demand upon the owner, and in writing, when it deemed such action necessary as regarded demands of much lesser moment.

We respectfully submit, that the evidence offered in support of this alleged demand, which is made the basis of this entire litigation, is evidence which should be looked upon with great suspicion, when considered in the light of the fact that all other demands were made directly upon the principal, and were made in writing.

It seems to us that this alleged oral demand bears the impress of an afterthought.

As already shown, the master was confronted

with serious difficulties. He sought all possible information regarding the removal of the temporary obstruction in the Panama Canal, which temporary obstruction by no means dissolved the contract of carriage.

When, after a delay of approximately two weeks it was then ascertained that the probability of the removal of the temporary obstruction within a reasonable time was constantly decreasing, the master and the owner then directed their attention to the possibility of transhipping the cargo across the Isthmus of Panama.

These efforts were rendered futile—first, because of the absence of any means of transhipment, and secondly, because of the prohibition of the Government preventing a discharge of cargo without an absolute guaranty of immediate transhipment.

These facts were established by the appellant itself upon the trial of this case.

In other words, the master, acting as the agent of the owner and of all the shippers, exercised the best possible judgment in the interests of all, and after exhausting every reasonable means of completing the contract of carriage by the regular route, he then adopted the remedy provided in the bill of lading, and turned to the nearest reasonable port for a discharge of his cargo, to-wit, the City of New Orleans.

After all of these things had taken place; after

the difficulties had finally been solved; and after the transaction had been closed and the National Carbon Company had accepted its cargo at New Orleans it then comes forward and claims in its brief that the action of the master was not a reasonable action, and that the delay was an unwarranted delay, and attempts to evade the consequences of the very facts which it proved upon the trial of this case, showing the master's diligence and exercise of reasonable care, by asserting that it made a demand for the delivery of its cargo, and that such demand was refused.

If on October 23rd, 1915, the libelant called upon Mr. Kurz and made a demand for the delivery of its cargo at Colon, as it claimed by the testimony set forth on page 139 of the record, then why, on October 25th, 1915, did the same National Carbon Company make a written demand upon the Oregon-California Shipping Company to tranship the cargo, immediately, at the expense of the National Carbon Company.

The absolute inconsistency of this position, as shown by the conflict between the written declarations of the National Carbon Company and the alleged oral demand of the National Carbon Company, establishes that this alleged oral demand was an afterthought for the purpose of bringing the present case within the protection of the decision rendered in the case of "The Martha", 35 Fed. 314.

In the attempt, however, to complete the cycle of

this afterthought, the usual and characteristic omissions, evidenced by afterthought, occurred.

In the case of "The Martha", the libelant made its demand at a place where the cargo could be discharged; in the case of the "Eureka", the appellant made its demand at a place where the Government had prohibited the discharge of cargo, except upon the guaranty of immediate transhipment, and there is no evidence in the record that the steamship "Eureka" was ever in the port of Colon. The only evidence in this particular are the telegrams from the Captain, which were sent from Colon, and there is not a single scintilla of evidence to show that the appellant ever tendered to the steamship "Eureka", its owners, agents, or anyone else, any wharfage facilities, or other facilities, by which it could discharge the cargo of the National Carbon Company.

Furthermore, as has already been shown, the master was the agent of every shipper who had placed any cargo upon the steamship "Eureka."

Whenever a vessel sails from a given port, bound for another destination, each portion of a mixed cargo is deemed to have certain reciprocal obligations with reference to all other shipments of cargo upon the same vessel. In the event of the jettison of any one portion of the cargo to save any other portion of the cargo, the cargo saved must bear its proportion of the expense to the cargo lost.

Whenever, therefore, any portion of an entire

cargo is disturbed, such disturbance amounts to a violation of the obligation which exists between the remaining cargo and the portion which has been disturbed.

The master has no more right to prefer one shipper without cause than he has to prefer another shipper without cause; therefore, in the case of "The Martha", even where it was known that the cargo could not be forwarded for a period of three months, the shipper who made a demand for the delivery of his portion of the cargo tendered to the ship an average bond to indemnify the ship and the owner against any claims which might arise from the other shippers, because of the breaking of the cargo.

In the case at bar, there is not a single piece of evidence of any kind that the National Carbon Company ever offered to indemnify the steamship "Eureka" against any claims which might arise on behalf of the other shippers, in event that the cargo of the National Carbon Company was discharged at the port of Colon.

In addition to all this, the master of the steamship "Eureka" would have had a reasonable excuse to refuse the delivery of the cargo to the National Carbon Company, even if a proper demand had been made upon him for the delivery of the cargo at Colon, for the reason that the continuance of the obstruction which hindered the voyage was a matter of grave and serious doubt, and furthermore because it was the duty of the master, under the provisions

of the bill of lading, to go to the nearest port and tranship all of the cargo at the expense of the shippers.

Under these conditions, and in view of the provisions contained in the bills of lading, which do not appear in the case of "The Martha", the master would have violated his obligation to all the other shippers, had he conformed to any demand which the National Carbon Company might have made upon him for a delivery of the cargo at Colon, to say nothing of his violation of the Government rules, which prohibited the discharge of cargo at that particular time.

In the case of "The Martha", the period of future delay was known to the owners and to the master. In the case of the "Eureka" the temporary obstruction which hampered its voyage was the very uncertainty which has given rise to this litigation.

In the case of "The Martha", the court found that the master had no reasonable excuse for refusing to discharge the cargo. In the case of the "Eureka", the record is replete with reasonable excuses, and we venture to say that no man could have done more for the protection of the interests of all, than did the master of the "Eureka."

In the case of "The Martha", the shipper offered not only to pay the expenses of discharge, but likewise tendered a bond to protect the ship, the owner, and the master against claims which might arise on

behalf of the other shippers. In the case of the "Eureka", there is not the slightest evidence that any such tender was made, and in fact, there is no contention that any such tender was made.

We, therefore, contend that the case of "The Martha", on which the appellant so strongly relies and within the terms of which it has tried to bring itself by the feeble proof of an oral demand, as against all other demands which it made in writing upon the principal itself, is absolutely distinguishable, in every particular, from the facts of the case at bar, because, not only were the circumstances altogether different, but the shipper made an absolute guaranty to protect the master and the boat against the possible claims of all other shippers.

We, therefore, insist that no proper demand has been proven in the case at bar, because it appears from the testimony introduced by the appellant, that L. Rubelli's Sons were not the General Agents of the Oregon-California Shipping Company, and not the proper parties upon whom to make a demand of so vital and important a character.

We insist, in the second place, that the evidence introduced by the appellant for the purpose of establishing this alleged demand is suspicious in character, because all other demands made by the appellant during the period of these negotiations were made in writing, and were made directly upon the Oregon-California Shipping Company.

Furthermore, the evidence offered in support of this alleged demand fails to establish the existence of any wharfage facilities by means of which the demand could have been complied with; fails to show any offer to protect the ship against the reciprocal claims of other shippers; fails to show why the National Carbon Company should have been preferred against the other shippers, and the other evidence introduced by the appellant itself shows that the Government prohibited a discharge of cargo, in the absence of an absolute guaranty of immediate transhipment, and likewise shows that not only was transhipment impossible, but that the National Carbon Company, itself, had made no arrangements for such transhipment.

The appellant rests its entire case upon this alleged demand; therefore, the failure of the appellant to show any demand upon the proper parties, and the failure of the appellant to show the making of any sufficient demand even though made upon the proper parties, required the entrance of the decree in this case dismissing the libel and awarding to the claimant its costs and disbursements.

We, therefore, respectfully submit that the decree of the lower court should be affirmed, not only upon the ground that the record in this case failed to establish any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, but upon the further ground, that the same record failed to disclose that any proper or sufficient demand of any kind was made upon those

having charge of the voyage in question, such as would bring the present case within the rule laid down in the case of "The Martha."

Owing to the fact that the appellant has based its entire claim upon the alleged demand, which it asserts was made upon the firm of L. Rubelli's Sons, the insufficiency of such demand, in every particular, necessitates an affirmance of the decree rendered in this case, and the consequent dismissal of this proceeding.

Independently of this fact, however, and regardless of the sufficiency or insufficiency of such demand, the appellee further contends that the Steamship "Eureka" fulfilled its contract of carriage in all respects, and that no liability of any character can be established against the steamship for the alleged damage to the goods of the National Carbon Company.

The appellee asserts that no such liability exists, for the reason that neither the allegations of the libel, nor the evidence offered in support thereof, establishes any breach of the contract of shipment upon the part of the Steamship "Eureka", for the following reasons:

First: The provisions of the bills of lading, under which the goods in question were shipped, exempt the carrier from liability for delay in transportation, arising from causes such as are established by the undisputed evidence of this case.

Secondly: That the reasonable exercise of discretion by the master, under the circumstances established by the appellant's evidence, is binding upon the appellant as well as upon all the other consignees, in whose interest and for whose benefit the master acted, both as a proposition of general maritime law, and as a result of the relation of principal and agent which exists between the master and the consignee under such conditions.

Thirdly: That the appellant has offered no evidence showing that any act of the ship was the direct and proximate cause of the damage alleged.

Fourthly: That there has been no sufficient proof of any damage whatsoever.

Discussing these propositions in their respective order, we direct the Court's attention to the exemptions contained in the bills of lading, under and in accordance with the provisions of which the cargo in question was shipped.

As already stated in the resume of the pleadings, set forth in the statement of facts, the carrier was exempted from liability for loss or damage occasioned "for causes beyond his control or accidents of navigation of whatsoever kind," or "for any loss or damage caused by the prolongation of the voyage," or for damage "while the said property awaits conveyance from any point of transhipment," and was furthermore given authority to tranship the goods, or deliver all or any part thereof, whether at the

terminus of the voyage or not, whenever the ship was prevented from delivery in the regular course of transportation "in consequence of ice, weather, epidemic, quarantine, * * * and all analogous circumstances whatever."

The admitted facts, established by the evidence introduced on behalf of the appellant in this cause, established that the completion of the voyage of the Steamship Eureka was prevented by slides in the Panama Canal, as a consequence of which the United States Government prohibited all ships from going through the canal from about October 1, 1915, to the early part of January, 1916.

This was undoubtedly a cause beyond the control of the carrier and an accident of navigation within the meaning of the exemption clause contained in the bills of lading, and was likewise a cause analogous to ice and weather within the provisions of such exemption clause of the bills of lading.

It is undoubtedly a well established rule of maritime law that all provisions of a bill of lading must be considered in the light of the rule of reason.

It must further be conceded that, in the application of this rule of reason, courts of admiralty not infrequently reject the isolated words of a bill of lading, which are palpably unfair to either party, and enforce the provisions of the bill of lading from the standpoint of the entire contract and the primary purpose and intention of the parties.

It then becomes necessary to review the exemptions contained in the bills of lading, under which the cargo involved in the case at bar was shipped, and ascertain whether or not such exemptions are enforcible exemptions when considered in the light of the rule of reason.

The primary purpose of the parties to the contract, involved in this controversy, was the shipment of certain cargo from the ports of New York and Philadelphia on the eastern coast of the United States, to the ports of San Pedro and San Francisco on the western coast of the United States, through the Panama Canal.

This route, so designated in the bills of lading, was a comparatively new route, when considered from the standpoint of navigation, and in view of this fact, the parties agreed to protect the carrier against unforeseen exigencies which might arise, in the passage to be made through the Panama Canal. In view of this situation, they provided in their bills of lading, as follows:

> "2. No carrier shall be liable for delay, * * * while the said property awaits conveyance from any point of transhipment."

Also

> "3. No carrier, * * * shall be liable for * * * detention or accidental delay."

When the Steamship Eureka arrived at the east-

ern entrance to the Panama Canal, the slides occurred, which prevented her immediate passage through the route designated in the bills of lading. The momentary result of these slides was to impose delay upon the said steamship.

After his arrival at the eastern entrance to the Panama Canal, and after discovering the conditions which confronted him, the master immediately notified the ship's owners, and they in turn notified the consignors of such conditions.

The master sought for information concerning the probability of the length of the delay which would be occasioned by the slides in the canal. He received advices from day to day that the character of the obstruction had not been definitely determined, and that the probable time of its removal was undetermined. He was further advised that the vessel might be able to proceed at most any time.

This action upon the part of the Captain, in delaying for a period of time until he could obtain some more definite information regarding the reopening of the canal, is the first act of delay upon the part of the ship of which the appellant complains.

While the complaint of the appellant in this particular is not specifically set forth in the libel, or any evidence introduced in support thereof, nevertheless, this specific instance of delay constitutes one link in the chain of delays, of which the appellant

complains, as constituting a breach of contract in detaining the alleged perishable cargo involved, for too great a length of time, within the torrid zone.

This action of the Captain comes directly within the exemptions of the bill of lading above set forth, which provide that the carrier shall not be liable for delay while the property awaits conveyance from the point of transhipment, nor for detention or accidental delay.

It must be admitted that detention existed, and it must likewise be admitted that the delay was accidental. The only question which presents itself is whether or not the enforcement of such provisions by the master comes within the rule of reason.

An analogous situation, to that which confronted the master of the Steamship Eureka, occurred a great many years ago in connection with the delay of a ship at the entrance to the Delaware Canal. When the ship arrived at the entrance to the Delaware Canal, it developed that the Canal was temporarily closed for some cause. Upon learning of this fact, the master kept down the Delaware Bay to Morris River, where the boat remained for two days.

Subsequently to that time, the boat went down the bay to the breakwater, and remained for five additional days. After the expiration of this latter period of time, the ship then put to sea, and all the property on board was lost on the following day. The consignor brought an action for certain hides which

had been shipped upon the boat. The shipment was made in accordance with the provisions of the following bill of lading:

Per Sloop Neptune.

"Philadelphia, January 14, 1836.

Received on board Hand's line for Baltimore, via Chesapeake and Delaware Canal, from J. Baynes, one hundred slaughter hides, on deck, which I promise to deliver to Joseph Davenport, at Baltimore, the dangers of the navigation, fire, leakage and breakage excepted, he or they paying freight eight dollars, and porterage one dollar and fifty cents.

H. Hand,

per H. H. Eldridge."

Upon the trial of the case the jury was instructed to find for the plaintiff. The defendant tendered and was allowed a bill of exceptions, and prosecuted a writ of error. The Supreme Court of Pennsylvania, in affirming the decision of the lower court, used the following very significant language, in determining the duty of the master under the conditions which confronted him:

"This is a contract to carry the goods to the place of destination in a prescribed route. This construction of the contract, although not conceded to be correct, has been faintly denied. It

can not be pretended, that if a loss arises in an attempt to convey the goods by sea round Cape Charles, the owners would be liable for the loss unless they could show that the deviation arose from necessity. And yet the carriage by sea would be optional with the carrier, unless the route through the canal is parcel of the contract. There is no mistaking the intention of the parties to the contract. It is well known to shippers, that the navigation is less dangerous by the canal, than by the outward passage. The risk is so much diminished, that it supersedes, in a great measure, the necessity of insurance on the goods, which no prudent person would omit, if he should ship goods in the inclement season of the year, to be conveyed around the coast to the place of destination. And that there was a difference in the risk, was the impression of the owners of the vessel; for the advertisement of the twenty-fifth of March, presupposes the assent of the shippers to the alteration of the route, and the transfer of the goods to a vessel of a different description.

"But it is said, that although the contract was to carry the goods by the way of the Chesapeake and Delaware Canal, yet the deviation from the prescribed route arose from necessity. The evidence does not show with precision, the nature of the obstructions which prevented the passage of the vessel through the canal, but it sufficiently appears, that they were of the ordinary kind, and of a temporary nature. When

the master discovered the impediments to the prosecution of the voyage, through the route called for in the contract, his duty was plain; he had one of two courses to pursue; to remain in a place of safety at the mouth of the canal, or in some convenient and safe place in the neighborhood, until the obstructions were removed; or he should have returned and informed the owners and shippers of the impracticability of proceeding through the canal. The legal effect of the contract, is an engagement to deliver the goods at Baltimore, in a reasonable time; and what would be a reasonable time must be determined under all the circumstances, with a view to the condition of the canal, the season of the year, the state of the weather, and such other matters as might enter into the question. If either of these courses had been pursued, and the shipper had brought suit for a breach of the implied contract to deliver the goods in a reasonable time, the condition of the canal at the time, would have entered materially into the question. But notwithstanding this, the case of Hadley v. Clarke, 8 T. R. 259, shows that a temporary obstruction only suspends, but does not dissolve the contract."

Hand v. Baynes, 4 Wharton, 204, 33 Am. Dec. 54, 55, 56.

The bill of lading in the above cited case contains no such provisions as in the case at bar, and, therefore, the rule laid down by the Supreme Court of

Pennsylvania, prescribing the duties of the master when confronted with a temporary obstruction in a canal, becomes of particular importance in determining the reasonableness of the exemptions in the bills of lading in the case at bar as applied to the immediate exigencies, because it establishes by judicial authority the rule of reason to be applied independently of the exemptions of a bill of lading.

The rule prescribed by this decision gives to the master not only the privilege of waiting at the mouth of the canal when the same is temporarily obstructed, but imposes upon him the duty of such act, providing he does not delay longer than a reasonable time, and in accordance with the rule above laid down, the question of what constitutes a reasonable time must be determined from all the circumstances of the case.

The evidence introduced upon the taking of the depositions in the case at bar, discloses that, on September 28th, 1915, the Steamship Eureka arrived at the Atlantic entrance of the Panama Canal (See Libelant's Exhibit 43-A). This exhibit was a telegram from the master of the ship, in which he stated that he did not expect to be able to leave before October 10th, and requested that the owner consult with the officials at Washington for further information as to the opening of the canal.

On October 8th, 1915, within about a week after the arrival of the said steamship at the Atlantic entrance to the Panama Canal, the Quaker Line ad-

dressed a letter to the Honorable Woodrow Wilson, President of the United States, seeking information as to the probable date of the reopening of the canal (See Libelant's Exhibit 48).

On October 9th, 1915, the master of the ship sent a telegram to the agents of the owner that he had received advices to the effect that ships of thirty foot draft would be able to pass through the canal on November 1st (see Libelant's Exhibit 49).

On October 11th, 1915, the master of the ship again sent a telegram advising that he had been informed that the canal would open by November 1st (see Libelant's Exhibit 53).

On October 11th, 1915, the master sent another telegram stating that he had been further advised that the canal would not open by November 1st (see Libelant's Exhibit 54).

It further appears that the Steamship Eureka drew only twenty-one feet of water (see Libelant's Exhibit 55).

On October 12th, 1915, the Government of the United States, through the Panama Canal office, advised the owners of the Eureka that it would be impossible to predict the approximate date of the reopening of the canal, and that the Government did not advise sailing by the Panama route until further notice (see Libelant's Exhibit 56).

On October 8th, 1915, the Government of the

United States issued a letter to the effect that there was no definite prospect of opening the canal until November 1st, 1915 (see Libelant's Exhibit 57-A).

On October 12th, 1915, a memorandum was issued by the Government of the United States advising that the continued movements or sliding material precluded the possibility of fixing any approximate date of the reopening of the canal (see Libelant's Exhibit 62-B).

On October 13th, 1915, the Government of the United States issued another memorandum covering in detail the condition of the canal, raising a doubt as to whether ships of thirty foot draft would be able to pass through within any particular time (see Libelant's Exhibit 62-C).

On October 15th, 1915, the master of the ship was advised that no definite information could be obtained as to the probable date of opening (see Libelant's Exhibit 63).

On November 4th, 1915, the master decided to no longer wait and started for New Orleans (see Libelant's Exhibit 73).

It thus appears from the evidence introduced on behalf of the appellant itself that the steamship arrived at the Atlantic entrance to the Panama Canal on September 28th, 1915.

It further appears that, from September 28th, 1915, until October 15th, 1915, the master and the

owner of the ship were being constantly advised by the United States Government of the probability that a ship of no greater than thirty foot draft (the Eureka being of twenty-one foot draft) might be able to pass through the canal within a reasonably short time.

Relying upon these advices, the master waited from day to day in a safe place at the entrance to the canal, looking for further and definite information as to its ultimate opening. According to the rule laid down in the case of Hands v. Baynes, this was the duty the law imposed upon the master .

It further appears, from the evidence, that the master waited in this condition from the 28th of September until the 15th of October, 1915, expecting each day to receive information that the canal would finally be opened. The condition of the weather, however, as shown by the reports of the United States Government, and the excessively heavy rains, daily increased the difficulties of slides in the canal, and added continually to the uncertainty of the date when the same would be opened.

Under these circumstances, we contend that the action of the master in delaying for this period of time, owing to the uncertainty of the advices which he was receiving, was a reasonable delay, and that the provisions of the bills of lading above set forth, protecting the carrier against damages for detention or accidental delay, when applied to the immediate circumstances of the case at bar, must be construed

as reasonable provisions, and provisions reasonably within the contemplation of the parties.

Beginning on the 15th day of October, 1915, when the master was advised that no definite information could be obtained as to the probable date of the reopening of the Canal, efforts were made by the limited agents of the S. S. "Eureka" to procure a method of transhipping the cargo.

This fact appears from the testimony of Mr. Kurz, one of the witnesses for the appellant set forth upon pages 142-145 of Libelant's Exhibit 1.

According to this testimony, the firm of L. Rubelli's Sons, of which Mr. Kurz was a member, together with the Oregon-California Shipping Company, made a thorough investigation of all possible and practical methods of dispatching the boat or cargo to the points of destination, and made efforts for transhipment across the Panama Canal and up the western coast by other carriers; and interviewed amongst others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Company, the Panama Pacific Line of New York and owners of the Edison Line at Boston, the Alaska Steamship Company and Olson & Mahoney.

This evidence likewise shows that all of these efforts were futile, and could not be successfully carried into effect.

It likewise appears that one of the principal reasons why such efforts were futile was that the Government would not permit the unloading of the vessels detained on either the east or west entrance of the Canal unless the parties so unloading had definite arrangements for transhipment.

It likewise appears from Libelant's Exhibit 24 that as late as November 3rd, 1915, efforts were being made to tranship the cargo by the way of the Panama Railroad, and the Nationl Carbon Company was so notified.

Again it appears from Libelant's Exhibit 26 that on November 4th, 1915, the appellant received a telegram from Mr. Kurz to the effect that all possible means were being employed for the disposition of the cargo on the S. S. "Eureka."

It also appears from claimant's Exhibit "C," being a telegram from the Oregon-California Shipping Company to L. Rubelli's Sons, that every effort was being made as early as October 16th, 1915, to make some provision for the disposition of the cargo.

The Oregon-California Shipping Company and L. Rubelli's Sons were in constant communication with the master of the ship during this period of time, and the master, acting upon these advices as to the efforts being made for transhipment, continued his delay at the eastern entrance of the Panama Canal until November 4th, 1915, when it had been finally determined that all efforts of transhipment were futile.

We, therefore, submit that the exemptions above set forth, when interpreted in the light of the circumstances of this particular case, and in the light of the performance of the duty which the law imposes upon a master regardless of the provisions of a bill of lading, and in the light of the discretion which was actually exercised by the master in the case at bar, must be held to be within the rule of reason, and that the carrier must be exempt from any claim for damages alleged to be due to the delay ensuing between September 28th, 1915, and November 4th, 1915. This was the longest period of delay in the torrid zone, and the one of which the libelant most vigorously complains.

After the master became convinced that the slides in the Panama Canal would continue to constitute an impediment to the continuance of his course for an unreasonable length of time, and that all efforts to accomplish a transhipment were futile, he then proceeded to adopt the remedy provided for by the contract between the parties set forth in section eight of the bills of lading. This section provided, amongst other things, as follows:

> "8. When the loading, transport, transhipment or delivery is prevented in consequence of ice, weather, * * * and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled * * * to transship * * * and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all ex-

penses of transshipment or warehousing * * *, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for the account of the shipper, consignee or party claiming the goods."

The literal meaning of the above provision is too plain to admit of argument. The expression "all analogous circumstances whatever" is broad enough to include the slides which took place in the Panama Canal.

The master, therefore, acting in accordance with this provision of the bills of lading, determined, in the exercise of his discretion, that the best and most logical means of procedure was to go to the port of New Orleans, La., and there unload the cargo for transhipment by rail. This was done, and the various consignors accepted the goods at New Orleans for transhipment by rail.

The only question which remains to be determined in this particular, is whether or not this provision of the bills of lading is such a provision as can be enforced without unfair advantage, and one which comes within the rule of reason. A long search of the authorities has failed to disclose any case wherein a provision of this exact language has been construed by the courts.

The case of Pacific Coast Company v. Yukon Independent Transportation Company, 155 Fed. 35, decided in the year 1907 by the Circuit Court of Ap-

peals for the Ninth Circuit, and which is one of the most illuminating and exhaustive opinions on the subject of the rule of reason, as applied in the consideration of bills of lading, discusses the provision contained in a bill of lading somewhat analogous to the above provision in the bills of lading involved in the case at bar.

In that case an agreement was made between the Pacific Coast Company and the Yukon Independent Transportation Company to ship a certain quantity of merchandise, including perishable articles from Seattle, Washington, to the Steamer Monarch at St. Michaels, at the mouth of the Yukon River.

The contract was made after negotiations with the understanding that the goods were intended for early sale in the Yukon River markets, and that the delivery was to be made as soon as the Steamship Senator should arrive at St. Michaels, or as soon as navigation was opened in that harbor.

The shipments were made about the end of May, 1901, and the voyage was the first of the season. It was known by the contracting parties that uncertainty existed as to whether the harbor of St. Michaels would be free from ice on the steamship's arrival, and that usually the harbor was not accessible before the first of July.

The Steamship Senator, on her way to St. Michaels, arrived at Nome on June 16th. After discharging a large portion of her cargo at that port, she proceeded with the remainder, which was the

merchandise consigned to the Monarch, and arrived off Golovin Bay on the morning of June 20th.

Golovin Bay was found to be filled with ice, and after cruising up and down off the face of the ice, and making an attempt to force a passage through it to St. Michaels, the said Steamship Senator, on the morning of the 21st, returned to Nome, and there her master offered to deliver to the consignee the goods at ship's tackle. This offer was declined.

The Steamship Senator then left Nome for Seattle, which port she reached on July 3rd. On July 7th, she started from Seattle on the second voyage, having the original cargo still on board. She went to Nome and thence to St. Michaels, where she discharged the cargo of the Steamer Monarch on July 19th. The ice had left St. Michael's harbor about July 1st, and if the Senator had remained off that port on her first voyage until July 2nd, she could then have entered the harbor and discharged the cargo.

The suit was brought to recover damages for loss on the goods and delay to the steamer Monarch. The amount of recovery was $12,119.75 for loss on the goods and $8,000.00 for delay of the Steamer Monarch. The bill of lading, under which the goods were shipped, provided, amongst other things, as follows:

> "Shipped by .....per Pacific Coast Steamship Co. (hereinafter called carrier), to be forwarded per Steamer Senator, or per some other of the carrier's steamers, * * *

the articles or property enumerated hereon in apparent good order, * * * to be forwarded with as reasonable dispatch as the general business of the carrier will permit, and delivered at vessel's tackle at the port, place or landing of St. Michaels * * * (but with the option to the master to carry the property on deck, to deviate and to lighter, surf, transship, land and reship the said property or any thereof and to stop and land and receive passengers and freight at intermediate ports or place).

"The property shall be received by the consignees thereof at the vessel's tackle * * *; if the consignee is not on hand to receipt the property as discharged, then the carrier may deliver it to the wharfinger, or other party or person believed by said carrier to be responsible, * * * or the same may be kept on board or landed and stored in hulks, or put in lighters by the carrier, at the expense and risk of the owner, shipper or consignee, and at his or their risk of any nature whatever.

"And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent, be conveyed upon said vessel to the nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provi-

sions of this contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property."

The trial court construed these provisions as inapplicable to the controversy before the court, and held that the steamship company was unable to take advantage of the exemptions, because the act of returning to Seattle, without delivering the cargo or waiting to deliver the cargo at the designated destination, constituted an abandonment of the voyage, and abrogated the contract so that the second voyage constituted an entirely new voyage, and was not governed by the provisions of the original bill of lading.

It was contended, upon appeal, that the trial court erred in its construction of the contract, but the appellate court, in affirming the lower court, applied the rule of reason, and held that, regardless of the language used in the bill of lading, the same must be construed in the light of the situation confronting the parties, and that the act of the master in returning to Seattle, without making further effort to deliver the cargo to the Steamer Monarch, constituted an unreasonable construction of the terms of the bill of lading, and held that the libelant was entitled to recover damages because of the unreasonable action of the master in abandoning the voyage without necessity or reasonable cause. In announcing this rule, however, after a review of the authorities, the court used the following language:

"The bills of lading, while they gave the right to deviate, contain special provision as to the permissible course of the appellants in the event that stress of weather or other cause should prevent the entrance of their vessel into the port of delivery. It provided that, in such a case, the cargo might, at the option of the master or agent, be conveyed upon said vessel to the nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of the contract in regard to the original voyage, and at the risk of the owner, shipper, or consignee. By this provision, the appellants were given the right, under the circumstances disclosed in the evidence, to carry the goods from off St. Michaels Harbor to Nome, and thence to carry them back to St. Michaels or to ship them to that port upon another vessel. They pursued neither course. They offered to deliver the goods to the appellee at Nome, but at ship's tackle, and they declined to assume the expense of lighterage or carriage to St. Michaels. The offer was not a compliance with the obligation of the contract, by the terms of which the appellants were bound to deliver the goods off St. Michaels at their own expense, notwithstanding the provision that the carriage from Nome to St. Michaels was to be at the owner's risk."

Pacific Coast Company v. Yukon Independent Transportation Company, 155 Fed. 29, 34, 35.

The provisions construed by the Circuit Court of Appeals in the above entitled case are very closely analogous to the provisions contained in the case at bar except that, in the case at bar, there exists a stipulation imposing the expense of transhipment upon the consignor or consignee, while in the above case the steamship company was given the privilege of deviation and transhipment without nullifying the contract; providing the expenses of transhipment were paid by the steamship company.

In other words, the Circuit Court of Appeals held that the provision allowing transhipment, in cases where the vessel was prevented by stress of weather or other cause from entering the place of delivery or completing the voyage, was a valid and enforcible provision, and within the rule of reason, but held that the ship had failed to perform its contract because it had neglected to pay the expenses of transshipment.

The only logical inference which can be drawn from the opinion is that, if the bill of lading had provided for the expenses of transhipment, and the master, in the exercise of his discretion, had transhipped the goods at the owner's expense, then such act upon the part of the steamship company would have been a compliance with the obligations of the contract.

The court, in effect, held that the provisions of a bill of lading, allowing transhipment at the expense of the consignor or consignee, in instances where the vessel was unable to complete her voyage, were valid

provisions and within the rule of reason, providing the ship did not take unreasonable advantage of the bargain.

This very principle was pointed out by the United States District Court, for the District of New York, in the case of The Citta Di Messina.

The Messina was an Italian cargo steamer plying between Mediterranean ports and New York. Between August 31st, and September 2nd, 1908, the steamship received a large number of onions consigned to the libelants and others in the State of New York. On September 3rd, she left Denia (the last onion port) and arrived at Almeria on the morning of September 4th. She went there for the purpose of getting twelve thousand barrels of grapes.

The Messina remained in Almeria until the evening of September 16th, 1908, and during that time she received, instead of the large quantity of grapes expected, only six hundred fifty-one barrels.

While the Messina was lying in port, other vessels, thought to be faster, came in and took away whatever grapes were ready for shipment. The boat then left Almeria, and went to the port of Malaga, and after loading made her usual trip across the Atlantic. On arrival in New York, on October 5th, the onion cargo was found to be extensively decayed and the merchantable quality of the rest was much impaired by decaying onions producing stains on the crates and contaminating the sound contents.

The bills of lading under which the shipments were made recited that the Messina was bound for New York, "but with liberty to the steamer either before or after proceeding towards that port to proceed to and stay at any ports or places whatsoever, although in a contrary direction to or out of or beyond the route to the said port of discharge, once or oftener, in any order backwards or forwards, for loading or discharging cargo or passengers or for any purpose whatsoever; and all such ports, places and sailings shall be deemed included within the intended voyage."

It was further agreed in and by the bills that the steamer was not answerable for decay or inherent deterioration, and also that the steamer was not to be responsible for any loss or damage which might arise to fruit or other perishable goods on board, through delay, or loss of time in obtaining and loading other goods to complete the cargo at that or other ports at which she might thereafter call.

There was little ventilation in the hold of the ship at anchor, even though the hatches and ventilators were kept open, and it appeared that under favorable conditions onions, of the kind shipped, would last for three or four months after arrival in the United States.

The evidence established the fact that the weather in Almeria was neither hot nor cold, but the court found that the temperature was higher than was favorable for keeping onions sound.

The libelants alleged that damage to the onions was due to the negligence of the Messina in breaching its contract by remaining in the port of Almeria from the 3rd to the 16th of September, 1908, which it was claimed was entirely unnecessary and constituted a deviation.

District Judge Hough, after reviewing the facts and concluding that the libel must be dismissed, rendered a very able and carefully reasoned opinion, pointing out the distinction between damages arising from deviation as a result of the warranty not to deviate, and damages arising from negligence upon the part of the carrier, such as will remove the goods from the exceptions and exemptions contained in the bill of lading. The opinion is so concise that we present it as an entirety:

> "It is obviously advantageous, if not essential, to libelants' case, to show that the facts found constitute deviation. That 'deviation' is a term of art, belonging in the main to the law of marine insurance, and to be interpreted by that law, seems to me to have been overlooked in argument; and this belief on my part must excuse some review of the subject.
>
> "If an insured shipowner fails to pursue that course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminous to the other, he violates a tacit but universally implied condition of the con-

tract between himself and his underwriter, who is therefore freed from liability for loss subsequent to deviation because the assured has enhanced or varied the risks insured against. 2 Arnould, Mar. Ins. (8th Ed.) Sec. 376; 1 Phil. Ins., Sec. 977.

"If the assured cargo owner have his cargo on a vessel which deviates, he for the same reason may lose (though by no fault of his own) all remedy for subsequent loss against his underwriter, but may proceed against the wrongdoing ship for his damages. It is not, of course, necessary that a cargo owner, in order to recover against his carrier for losses subsequent to deviation, should have himself lost insurance protection by reason thereof. The voyage is the same, whether viewed from the standpoint of insurer or shipper, and any deviation therefrom will cast subsequent loss of or injury to either ship or cargo on the shipowner. The reason also is the same, viz., that the carrier by deviating from a voyage described alike in insurance policy and bill of lading, has broken the warranty not to deviate, thereby terminated his own insurance, and given the shipper a right either to rescind the contract of shipment and treat the goods as converted by the deviator, or to accept the goods, holding the ship responsible for damages subsequent to warrant broken, without any reference to the question whether the deviation had any bearing on the particular loss complained of. Thorley v. Orchis S. S. Co., 1 K. B.

(1907) 660; Thatcher v. McCulloh, Olcott, 365, Fed. Cas. No. 13, 862.

"In effect the deviator loses his own insurance, and becomes the insurer of his cargo from the date of deviation. If, therefore, the Messina was guilty of a deviation, it is wholly immaterial whether her stay at Almeria had or had not any casual connection with the rotton onions found on board in New York. If they were sound when the deviation occurred, the ship must answer for their subsequent damage. That delay, even upon the route prescribed by policy and or bill of lading, may amount to deviation, has been often held (Company of African Merchants v. Ins. Co., L. R. 8 Exch. 154; Coles v. Marine Ins. Co., 3 Wash. C. C. 159, Fed. Cas. No. 2, 988; Audenried v. Mer. Mut. Ins. Co., 60 N. Y., 482, 19 Am. Rep. 204), though the recent British marine insurance act (1916) has excluded delay from the definition of deviation (section 46), while giving the insurer (by section 48) the same release from liability 'from the time when the delay becomes unreasonable.'

"It being, however, still the law of the United States that a deviation (eo nomine) occurs the moment a delay even upon the prescribed route becomes unreasonable, the libelants here insist that the Messina's reasonable stay in Almeria expired in at most four days, yet they have endeavored to show further that her actual stay in the then conditions of weather was injurious

to their onions; a labor quite needless if the delay produced deviation.

"It seems to me that in some cases where shippers have proved that the ship had injured their goods by reason of delay in ports of call, or calls in port unreasonable in respect of cargo already laden, the courts, while rightly awarding damages for breach of contract, i. e., for negligence, have spoken loosely of deviation as if that were the ground of decision. Glyn v. Margetson, A. C. (1893) 351, and cases cited. In Swift v. Furness (D. C.) 87 Fed. 345, the carrier of perishable cargo was authorized by his bill of lading to 'make deviation', and accordingly did so to the injury of his cargo, yet was held responsible. And see The Bordentown (D. C.) 40 Fed. 689, where the doctrine of deviation was invoked to fix liability on a tug which negligently took her tow beyond its destination, thereby exposing it to storm and causing loss. These were not cases of deviation in any proper sense; that word implies a voluntary departure from the usual course of the voyage 'in reference to the terms of a policy of marine insurance' (Hostetter v. Park, 137 U. S. 40, 11 Sup. Ct. 1, 34 L. Ed. 568), and if (for example) the vessels concerned in the Glyn and Swift Cases (supra) had done what they did when insured under voyage policies describing the voyages, as in the bills of lading on which the cases were actually defended, it would have been impossible to contend that a deviation had occurred. So, in this

case, the voyage described in the bills of lading is quite elastic enough to prevent even a longer delay than that in Almeria harbor from producing deviation 'in reference to the terms of a policy of marine insurance' setting forth the same voyage in the same language. C. F. Phillips v. Irving, 7 M. & G. 325; Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664, for striking instances of delay without deviation.

"Libelants cannot, therefore, recover on the ground just considered; and it remains to inquire whether claimants were quilty of negligence, and are therefore deprived of the protection of the exceptions in their bills of lading.

"The question of the burden of proof in actions such as this has been set at rest by The Folmina, 212 U. S. 362, 29 Sup. Ct. 363, 53 L. Ed. —, the nature of the injury shows this damage to be prima facie within the exceptions of the bills, and the burden is on the shipper to establish that the goods are removed from their operation because of the carrier's negligence. The only negligence assigned is delay in Almeria, and what transforms delays permitted by bills of lading, such as those in suit, into negligence, will always depnd upon what voyage was agreed upon in a business sense,—the agreement need not have been for the quickest or most direct mode of transportation. Evans v. Cunard S. S. Co., 18 T. L. R. 374, citing and explaining Glyn v. Margetson, supra. So, in this

case, libelants did not agree for a quick or direct method of conveyance; they did agree that the Messina could do just what she did, provided she did not take unreasonable advantage of the bargain. But that bargain is to be interpreted according to the general usuages of the trade, even though not known to any particular shipper. Hostetter v. Parks, supra; for the facts in Gray (D. C.) 11 Fed. 179.

"It follows, in my judgment, that the libelants must show, in order to recover, that the ship's stay in Almeria was a departure from general usuage, that it was unreasonable in respect of the cargo already laden, and that it was the cause of the damage complained of. The evidence falls short of these requirements. These libelants have made no better case than those in The Hindoustan, 67 Fed. 794, 14 C. C. A. 650, and not nearly so good a one in The St. Quentin (C. C. A.) 162 Fed. 883.

"Libel dismissed, with costs."

The Citta Di Messina, 169 Fed. 472, 474, 477.

As pointed out in the above decision, the shipper must base his claim for damages either on a breach of the warranty not to deviate, where a deviation is the direct cause of damage, or establish negligence upon the part of the carrier as a basis for depriving him of the advantages of exceptions and exemptions contained in the bill of lading.

The libel filed in the case at bar alleges that the owners of the Eureka breached the contract of the shipment by refusing to deliver the cargo to the consigors at Colon, but does not allege that the steamship breached the contract of carriage by diverting the cargo to New Orleans, or by negligently remaining at Colon for too long a period of time.

A liberal construction of the pleadings might allow the admission of evidence to show that the delay at Colon was an unreasonable delay, and, therefore, a deviation, or to show that such delay amounted to negligence sufficient to deprive the carrier of the exemptions contained in the bills of lading. Even admitting of such a liberal construction, however, of the pleadings in this case, no proof could be brought forward which could establish deviation, because, as shown in the case above cited, as well as in the case of Pacific Coast Co. v. Yukon Independent Transportation Co., 155 Fed. 29, 34, a deviation is a voluntary departure, without necessity or cause, from the regular and usual course of the voyage.

In the case at bar, it is admitted that the steamship was precluded from completing the voyage, and it is likewise admitted that the bills of lading protected the carrier against accidental delay or detention, and gave to the carrier the privilege of transhipment in the event of delay from any cause at the expense of the consignor or consignee.

It likewise follows in the case at bar that the admitted cause of the delay from the continuation of

the Eureka's voyage was prima facie within the exceptions and exemptions of the bills of lading, and such fact casts upon the shipper the burden of establishing negligence upon the part of the carrier so as to deprive him of the benefit of the exemptions.

The only negligence claimed in the case at bar was the alleged refusal to deliver the goods at Colon, and the delay at Colon from September 28th, to November 4th, and the diversion to New Orleans.

As already shown, however, the delay at the entrance of the canal was a duty imposed upon the master as an abstract proposition of law in carrying out the reasonable interpretation of the provisions of the bills of lading and the diversion of the cargo to New Orleans, and the transhipment of the same at the expense of the consignee was an act which the bills of lading expressly authorized the master to perform, providing "he did not take unreasonable advantage of the bargain" (169 Fed. 476).

In addition to the above ruling, showing that the provisions of a Bill of Lading allowing a Master to tranship goods at the cost of a shipper is a valid and enforcible provision, providing the Master does not take unreasonable advantage of the bargain, there exists still another rule of maritime law, which provides that, regardless of the stipulations of a Bill of Lading, the Master not only has the privilege of transhipping the goods when the completion of the voyage is prevented by unforseen obstructions, but there is imposed upon him a duty to tranship the

goods under such conditions, owing to his capacity as agent of the shipper.

This rule is laid down in the following decision of the English courts. The case is one of the oldest and best reasoned of the English decisions relating to maritime law.

The case referred to was an action in assumpsit on the part of the ship to recover an amount of increased freight incurred by reason of a transhipment resulting from a necessity arising on account of the perils of the sea and stormy weather. The court in sustaining the ship's claim for this additional freight, laid down the rule establishing the relationship of principal and agent between the master and ship owner. The language of the court in this particular was as follows:

> "One question, however, has been asked, which it will not be right to pass over. What, it has been said, if the transhipment can only be effected at a higher rate than the original rate of freight? Which party is to stand that loss? By the French Ordinance (a) and the Code de Commerce (b), and according to the decisions in America (to which Chancellor Kent refers 3 Com. 212), the ship owner is entitled to charge the cargo with the increased freight, and as a consequence of that rule, it becomes an average loss; and, in case of an insurance, must be made good by the insurers. * * * * No case of the sort that we are aware of has occurred in this

country; nor is it necessary for us to express any opinion further than as it bears on the present question. It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight so as to occasion no farther charge to the freighter; and that, where the freight can not be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant, for it must never be forgotten that the master acts in a double capacity as agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owners right to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination even at an increased rate of freight; and, if so, it will be the duty of the master as his agent to do so. IN SUCH CASE, the freighter will be bound by the act of his agent, and, of course, be liable for the increased freight. The rule will be the same whether the transhipment be made by the ship owner or the master, and in applying it, circumstances make it necessary, on the one hand, to repose a large

discretion in the master or owner while the same circumstances require that the exercise of that same discretion should be very narrowly watched."

Shipton against Thornton, 9 Adolp & Ellis, 312, 336.

According to the rule laid down in the above decision, it was the duty of the Master of the Steamship "Eureka" to tranship the cargo of the appellant when it was finally ascertained that the slides in the Panama Canal had rendered impossible the completion of the contract of affreightment according to its original terms.

The case goes still further and holds not only that the Master is obligated to perform the duty of transhipment as the agent of the shipper, but likewise holds that the shipper, "will be bound by the act of his agent, and of course, be liable for the increased freight."

It, therefore, follows, that the act of the Master of the Steamship "Eureka" in transhipping the goods of the appellant, when it finally became ascertained that the voyage could not be completed according to the terms of the original contract of carriage, was an act of such Master as the agent of the National Carbon Company, and an act by which the National Carbon Company is bound.

We, therefore, respectfully contend that it was the duty of the Master to remain at the Atlantic entrance to the Panama Canal just so long as there was any probability or hope that the boat might be able to go through..

> "The obligation of the carrier to deliver according to his contract is only suspended during any temporary obstruction. It is not thereby avoided; Angell on Carriers, sec. 289, and cases cited. Hence, plaintiff in error was bound, notwithstanding the hinderance of navigation by low water, to deliver defendant's goods in safety as soon as he could by reasonable diligence after the removal of the unavoidable cause of delay."

Bennett v. Bryam & Co., 38 Miss. 17, 75 Am. Dec. 90, 93.

We likewise contend that it was the privilege and duty of the Master, when he became convinced that the voyage could not be completed over the prescribed route, to divert the Steamship "Euraka" to New Orleans and from there tranship the cargo of the appellant by rail. Such privilege and duty existed by virtue of the special contract of carriage between the appellant and the Steamship "Eureka", as evidenced by the bills of lading, and likewise existed as a general proposition of law independently of the terms of the bills of lading. Such general rule would be incorporated by operation of law into the bills of lading, regardless of the specific provisions thereof.

It is an admitted fact in the case at bar that the Master of the "Eureka" waited at the Atlantic entrance to the Panama Canal from September 28th, 1915, to November 4th, 1915. It is likewise admitted that the cause of this delay was the existence of slide in the Panama Canal, which prevented the steamship from passing through.

It is likewise admitted that the delay of the Master during that period of time was induced by changing reports issued from time to time by the United States Government to the effect that the reopening of the canal might take place at any time.

It is further admitted that the bills of lading, under which the cargo in question was shipped, provided that the carrier should be protected against detention or accidental delay and against ice, weather or all analogous circumstances whatsoever.

In view of these admitted facts, the duty imposed by law upon the master to remain at the entrance of the canal during the existence of the temporary obstruction, augmented by the exemptions and exceptions in the bills of lading, deprives the appellant of any claim against the Steamship Eureka, upon the theory that her delay constituted a deviation or breach of the warranty against deviation.

In view of these admitted facts, the appellant is likewise deprived of any claim that the ship was deprived of the benefit of the exemptions contained in the bills of lading because of negligent delay, for the reason that such delay by the master at the en-

trance of the Panama Canal was an act in furtherance and in performance of a duty imposed upon such master by maritime law.

In view of these admitted facts, the appellant is likewise deprived of any claim against the steamship upon the theory that the diversion to New Orleans constituted a breach of contract and an abrogation of the provisions of the bills of lading, because such diversion was an act performed by the master as the agent of the consignors and consignees, as well as the agent of the steamship company; and was in accordance with the provisions of the bills of lading allowing such diversion at the expense of the consignors or consignees, providing the ship did not take unreasonable advantage of the bargain.

The evidence introduced upon the trial of this case establishes the fact that there existed no adequate means of discharging the cargo at the City of Colon. No wharfage or other privileges were there provided.

The evidence likewise establishes that the United States Government prohibited the discharge of any cargo at Colon, unless the ship so discharging the cargo furnished the Government with an absolute guarantee of immediate transportation to the western entrance of the Panama Canal, and a further guaranty of immediate transportation from the western entrance of the Panama Canal to the Pacific waters.

The evidence likewise establishes that no such method of transportation was available, although efforts in that regard were made, even by the agents of the National Carbon Company, the appellant in this case.

The court itself will take judicial notice of the fact that the next and most accessible port was that of New Orleans, Louisiana. Under such circumstances, and with such difficulties confronting the master of the Steamship Eureka, it certainly cannot be contended that the master took unreasonable advantage of the privilege allowed him by the bill of lading in diverting the cargo to the City of New Orleans, and charging the consignor and consignees with the expenses incurred in connection with such transhipment.

The appellant is, therefore, deprived of any claim of negligence against the Steamship Eureka, based on any negligence of the steamship growing out of any unreasonable advantage which its master took of the provisions contained in Section 8 of the bills of lading, allowing him to tranship, at the expense of the consignor or consignees, in those instances where the completion of the voyage was rendered impossible by accidental delay, detention, ice, weather and all analagous circumstances whatever.

Turning now to the second sub-division, a question arises as to whether or not the Master exercised a reasonable discretion in dealing with the difficulties which confronted him at the Atlantic entrance to the Panama Canal, and whether or not

such exercise of discretion is binding upon the appellant as well as upon all the other consignees in whose interests and for whose benefit the Master acted.

The master of a ship is the agent of all parties concerned for the purpose of protecting the ship and the cargo when unforseen emergencies arise; he is likewise the agent of the consignor and consignee in so far as the cargo is concerned. The question of whether or not the master takes a reasonable advantage of the privileges given by exemptions contained in a bill of lading is a question to be determined from the facts of each particular case.

As already shown by the authorities above cited, the question of a carrier's liability for damage to goods is determined according to the rules applicable to the relation of shipper and carrier in general, or according to the provisions of the bill of lading under which the goods are shipped.

In either instance, however, the question of liability is measured by the rule of reason.

If no bill of lading exists, then the question to be determined is whether or not the master exercised all reasonable diligence in the protection of the ship and the cargo in view of the conditions which confronted him. If the goods were shipped under a bill of lading, which bill of lading exempted the carrier from liability from any and all causes, then the question to be determined is whether or not the stipulated exemptions, when interpreted in the light of the

rule of reason, properly protected all parties concerned, and this question is determined by the fact of whether or not the master exercised sound judgment and discretion in enforcing the exemptions contained in the bill of lading.

In other words, did the master as the agent of all parties, use proper discretion and exercise a reasonable judgment for the protection of the ship and the cargo in view of the circumstances which confronted him? The rule in this particular has been very elaborately expounded by Mr. Justice Shiras in the following decision of the Supreme Court of the United States:

> "Mr. Justice Shiras delivered the opinion of the Court:
>
> The master of a ship is the person who is intrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interests of his employers, the utmost fidelity and attention. Abbott, Shipping, 7th Am. ed. 167.
>
> It was well said by the district judge in the present case, that "though exceptions . . . noted in the bill of lading contemplate circumstances of war, and are therefore applicable in the most extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prud-

ence for the interests of all concerned. The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo, and 'must endeavor to hold the balance evenly' between the ship and cargo when their interests conflict."

"All will agree that the master must act in good faith and exercise his best discretion for the benefit of all concerned." New England Ins. Co. v. The Sarah Ann, 13 Pet. 400, 10 L. ed. 219; The Amelie, 6 Wall. 27, sub, nom. Fitz v. The Amelie, 18 L. ed. 808.

The good faith of the master and his reasonable exercise of discretion must be considered and determined in the light of the facts in each particular case. The term "discretion" implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action. "Discretion means the equitable decision of what is just and proper under the circumstances." Bouvier. Law Dict. "Discretion means the liberty or power of acting without other control than one's own judgment." Webster Dict.

"Courts, in passing upon such questions should endeavor to put themselves in the position of the actors in the transaction, and not be ready to find that the course pursued was

blameworthy because the results were unfortunate; what those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible, but a deliberate and considerate judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not. Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390.

Applying these principles to the facts of the present case, we have to inquire whether the conduct of the master of the Styria showed a reasonable exercise of judgment, having regard to the rights of the owners of the vessel and those of the several owners of cargo."

The Steamship Styria v. Morgan, 186 U. S. 1, 46 L. ed. 1027, 1033.

Applying the test above set forth to the questions involved in the case at bar, it becomes necessary to determine whether the Master exercised "a deliberate and considerate judgment" in waiting at the Atlantic entrance to the Panama Canal until such time as he could determine, with a fair degree of accuracy, the improbability of its reopening within a reasonable time thereafter, and after determining such im-

probability, in taking the Steamship "Eureka" to the port of New Orleans and transhipping the cargo at the expense of the shippers.

As already pointed out in the case of Hand vs. Baynes, 4 Wharton. 204, above cited, the law imposed upon the Master the duty of remaining in a place of safety at the Atlantic entrance to the Panama Canal until such time as the obstructions were removed, or until such time as it became probably certain that the obstructions would not be removed so as to enable him to complete the voyage within a reasonable time. Therefore, in exercising his discretion in this particular, he was not only putting into effect "a deliberate and considerate judgment", but was fulfilling a solemn duty imposed upon him by law.

It is an admitted fact in the case at bar, that the slides in the Panama Canal came within the category of "unexpected emergencies". These unexpected emergencies were aggravated by the impossibility of obtaining any information concerning the probable length or shortness of their duration.

As already pointed out in the early part of this brief, the Steamship "Eureka" arrived at the Canal on September 28th, 1915. Immediately thereafter, the Master of the ship sent a telegram, in which he

stated that he did not expect to be able to leave before the 10th of October.

On the 8th of October, 1915, inquiry was made of the President of the United States as to the probable date of reopening the Canal.

On October 9th, 1915, the Master received information that ships of a thirty foot draft would probably be able to pass through the Canal by November 1st, the Master knowing that the "Eureka" was a ship of about twenty-four foot draft.

On October 11th, 1915, the Master was again informed that the Canal would in all probability be opened on November 1st, 1915.

On October 11th, 1915, the Master was again advised that the Canal would probably not open by November 1st, 1915.

On October 12th, 1915, the Government of the United States sent out advices to the effect that it was impossible to predict the possible date of the reopening of the Canal.

On the same date, a memorandum was issued by the United States Government, advising that the continued movements of sliding material precluded the possibility of fixing any date for the reopening of the Canal.

On October 13th, 1915, the Government of the United States issued another memorandum, which raised a doubt as to whether ships of thirty foot draft would be able to pass through within any particular time.

On October 15th, 1915, the Master was again advised that no difinite information could be obtained as to the probable date of reopening.

Beginning on the 15th day of October, 1915, when the Master was advised that no definite information could be obtained as to the probable date of reopening, efforts were immediately undertaken to procure some method of transhipping the cargo across the Isthmus of Panama and up the Pacific Coast. The various steamship companies which were interviewed with reference to the possibility of this undertaking have already been enumerated in detail. These efforts continued until the 4th day of November, 1915, at which time it became apparent that any such efforts at transhipment were futile.

All of these facts appear from the evidence introduced upon the trial of this case by the National Carbon Company itself.

According to the rule laid down in the case of The Steamship Styria vs. Morgan, 186 U. S. 1, above cited, the court "should endeavor to put itself in the position of the actors in the transaction". If this is done, it will immediately become apparent that the Master of the Steamship "Eureka" was confronted

with a condition of affairs which exceeded in perplexity the most severe situation conceivable.

When a Master encounters an obstacle which impedes the progress of his voyage, extreme apprehension must arise in his mind as he stops to consider the great value of the property placed in his care, augmented by the knowledge that his judgment concerning its final disposition is absolute. When, however, a Master encounters obstacles such as the slides which were encountered in the case at bar, aggravated by the never ceasing uncertainty of their removal, a far greater apprehension must of necessity arise in his mind. Especially is this true in the case of a new and unknown waterway, and in an instance where those for whom he is operating are endeavoring to build up a new branch of commercial activity.

It may be that when the action of the Master is viewed from the standpoint of retrospection, that another and better judgment might have been exercised. If the Master knew then, as he knows now, that the peculiar earth formation of the Panama Canal zone would result in an almost unceasing repetition of the slides, he would probably not have remained as long as he did. If the Master had known then, as he does now, that a transhipment across the Isthmus and up the Pacific Coast was an impossible undertaking, he would not have remained as long as he did.

As stated, however, by Mr. Justice Shiras in the

decision last cited—the arbiter should "not be ready to find that the course actually pursued was blameworthy because the results were unfortunate".

It should always be remembered that all human acts must be construed in the light of the rule of reason, and it is always much easier in the final analysis to determine what might have been done than to determine in the first instance what should be done. A very succinct and accurate statement of this principle was announced by the Supreme Court of Ohio in the following very expressive language:

> "There is an ex post facto wisdom, which, after everything has been done without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best light afforded."

American Express Co. vs. Smith, 33 Ohio State 511, 31 Am. Reports, 561.

The above principle was recognized by the Supreme Court of the United States in the very recent case of North German Lloyd vs. Guaranty Turst Company, decided May 7th, 1917.

This was a case wherein the "Kronprinzessin

Cecilie", a German steamship, received some gold in New York to be transported to Plymouth, Eng. and Cherbourgh, France. On July 28th, the steamer set sail for Bremmerhaven, Germany, by the way of Plymouth and Cherbourgh; she continued on her voyage until 11:05 P. M. July 31st, when she turned back, being then in 46 degrees 46 minutes N. Latitude, and 30 degrees 20 minutes W. Longtitude from Greenwich, a distance from Plymouth of 1070 nautical miles.

At that moment the Master knew that war had been declared by Austria against Servia (July 28th); that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange.

The master had proceeded about as far as he could, with coal enough to return if that proved needful, and was of the opinion that the proper course was to turn back. The ship reached Bar Harbor, Me., on August 4th, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31st, the German Emperor declared a state of war, and the directors of the company at Bremen, sent a wireless to the master to the effect

that war had broken out with England, France and Russia, and with directions to return to New York. Thereupon the master turned back.

The probability was that the steamship, if not interferred with or prevented by accident or unfavorable weather, would have reached Plymouth before the final declaration of war. The libellant claimed that the master was not justified in turning back. In denying the libellant's claim in this particular, the Supreme Court, speaking through Mr. Justice Holmes, rendered the following very interesting decision applicable to contracts of affreightment, and the standard by which the judgment of a master should be determined:

> "With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers, or people" other exceptions necessarily are to be implied; at least, unless the phrase "restraint of princes" be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like Paradine v. Jane, Aleyn, 26, 82 Eng. Reprint, 897, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contract would have

demanded or the contractor would have assumed. Baily v. De Crespigny, L. R. 4 Q. B. 180, 185, 38 L. J. Q. B. N. S. 98, 19, L. T. N. S. 681, 17 Week Rep. 494, 15 Eng. Rul. Cas. 799. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. Taylor v. Caldwell, 3 Best & S. 826, 839, 122 Eng. Reprint, 309, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week Rep. 726, 6 Eng. Rul. Cas. 603. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England, there can be no doubt that it would have been warranted in turning back. See Mitsui & Co. v. Watts, W. & Co. (1916) 2 K. B. 826, 845, 85 L. J. K. B. N. S. 1721, 115 L. T. N. S. 248 (1916) W. N. 271, 32 Times L. R. 622; The Styria v. Morgan, 186, U. S. 1, 46 L. ed. 1027, 22 Sup. Ct. Rep. 731. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. The Teutonia, L. R. 4 P. C. 171, 8 Moore, P. C. C. N. S. 411, 17 Eng. Reprint, 366, 41 L. J. Prob. N. S. 57, 26 L. T. N. S. 48, 20 Week, Rep. 421; The San Roman L. R. 5 P. C. 301, 307, 42 L. J. Prob. N. S. 46, 21 Week. Rep. 393, 1 Asp. Mar. L. Cas 603. And when we add to the seizure of the vessel the possible detention of the German and some of the other

passengers, the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we can see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. Oliver v. Maryland Ins. Co. 7 Cranch, 487, 493, 3 L.ed. 414, 416; Craig v. United Ins. Co. 6 Johns, 226, 250, 253, 5 Am. Dec. 222. See also British & F. M. Ins. Co. v. Sanday (1916) A. C. 650, 85, L. J. K. B. N. S. 550, 21 Com. Cas. 154, 114, L. T. N. S. 521 (1916) W. N. 44, 32 Times L. R. 266, 60 Sol. Jo. 253.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of the capture, it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German ship owners. The order from the Imperial Marine Office, if not a binding command, at least shows that if the master had remained upon his course one day longer, and had received the message, it would have been his duty as a prudent man to turn back. But if he had waited until then, there would have a question whether his coal would hold out. Moreover if he would have been required to turn back before deliver-

ing, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form, and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of the Styria, supra, although not strictly in point, tends in the directions of the principles that we adopt."

The Kronprinzessin Cecilie, 244 U. S. 12; North German Lloyd vs. Gauranty Trust Co., 61 L. Ed. 960, 965-966.

In the light of the rules announced in this decision, it can hardly be doubted that the Master of the Steamship "Eureka" exercised a sound discretion, and did as a prudent man would have done under all the circumstances of the case.

His waiting at the Atlantic entrance to the Canal until some approximation could be made concerning the duration of the slides was essential to a sound judgment, and was in furtherance of a legal duty.

The efforts to tranship the cargo over the nearest and quickest route across the Isthmus of Panama was in furtherance of a sound judgment, and in performance of the terms and conditions of the bills of lading under which the cargo was shipped.

His final act in going to the port of New Orleans and transhipping the cargo from there by rail, was the last and only alternative left to the Master, and was likewise evidence of a sound judgment, and an act in performance of the terms and provisions of the bills of lading.

It is very easy to assert at this time that the Master might have returned to the port of loading, and discharged the cargo, but the very person who would now make such an assertion would have been the

first to complain if, during the period of return, the Canal had been reopened.

It is very easy to say that the Master might have gone to New Orleans at an earlier date, but the very party who would now make such an assertion would likewise have been the first to complain if the Canal had been reopened while the Master was returning to the port of New Orleans, providing he had not remained a reasonable length of time at the Eastern entrance of the Panama Canal.

It is very easy to say at this time that the Master should not have delayed from October 15th to November 4th, 1915, seeking a method of transhipment across the Isthmus of Panama, but the very person who would now make such a contention would have been the first to complain if the Master had omitted this precaution and the possibility of such a transhipment had developed.

We, therefore, respectfully contend that the action of the Master in seeking information as to the reopening of the Canal, in seeking information as to the various methods of transhipment across the Isthmus, and in finally turning to the port of New Orleans, was an action founded upon an honest and sound judgment, and was likewise an action in furtherance of the exercise of that discretion which he owed to all the shippers of cargo on the Steamship "Eureka", and an action which was in fulfillment of the conditions and covenants of the bills of lading under which the goods were shipped.

We likewise respectfully contend that even if the National Carbon Company had made a proper demand upon the Steamship "Eureka" for a delivery of its cargo at the port of Colon, that the Master would have been fully justified in refusing to conform therewith.

As already pointed out in the decisions above cited, the Master is not only the agent of the Steamship, but is likewise the agent of the owner, the agent of the charterer, the agent of each and every shipper, and the agent of all those having any interest in the voyage. Acting in this capacity, he owes an equal obligation to each and all of these conflicting interests. To conform to the demand of any one person having an interest in the voyage as against all the other interests, would amount to a breach of the legal duty which rests upon the Master.

Under the provisions of the bills of lading covering the shipments in the case at bar, the Master bound himself to tranship the cargo in event that he encountered obstacles which prevented the completion of the voyage. This was a covenant of the written contract under which he took possession of the cargo. It was a covenant, the performance of which he owed to the owner of the steamship, and owed to each and all of the shippers.

Not only did he owe the performance of this covenant as a matter of special contract, but he likewise owed the performance of this covenant as a matter of general law.

It has been held that in instances where difficulties arise which prevent the possibility of completing the contract of carriage on its original terms, that then it becomes the privilege and duty of the Master, as the agent of the shipper to tranship the goods, and that when such act is performed by the Master, he is deemed the agent of the shipper for the purpose of such performance.

This was the rule announced in the case of Shipton v. Thornton, 9, Adolph & Ellis, 312, 336, cited above.

Applying the rule laid down in that case to the facts of the case at bar, we have a situation where the appellant in the present case is seeking to establish a claim against the steamship upon the basis of a demand made upon its own agent, because, under the rule above cited, the Master was agent of the shipper for the purposes of transhipment, or other disposition of the cargo in the event that he encountered unforseen obstructions to the completion of the voyage.

We likewise have an instance where the appellant is seeking to etablish a claim against the steamship for the alleged refusal of its own agent, who was at the same time the agent of all the other shippers, to conform to a demand which preferred the interests of the appellant to the interests of all the other shippers.

This supposed situation proceeds upon the as-

sumed theory that the appellant had actually made a demand upon the steamship instead of upon the unauthorized representatives of the steamship. Even upon this theory, however, it cannot be logically contended that the appellant could hold the steamship liable for the act of its own agent in refusing to discharge the cargo, or the act of its own agent in actually transhipping the cargo.

It appears from the undisputed evidence introduced upon the trial of this case that the cargo of the appellant constituted only a limited portion of the cargo which was consigned on board the Steamship "Eureka". Under the rules of the law above cited, the Master was not only the agent of the appellant, but was likewise the agent of all the other consignors. Acting as such agent for the other shippers, as well as the appellant, the Master was required to do that which would be for the best interests of all.

If a demand had actually been made upon the ship for the delivery of the appellant's cargo at Colon, and the Master had conformed therewith, and during the period of such conformance the Canal had been reopened, then the Master and the ship would have been liable to the other shippers for too long a delay on the prescribed route, and would likewise have been liable to the other shippers for preferring the interests of one to the interests of all, while acting as the agent of all.

Furthermore, if a demand had been actually made upon the steamship or the Master for a de-

livery of the cargo at Colon, and he had conformed therewith before putting out to sea, and a disturbance of the ballast had damaged the cargo of the other shippers, then he would have been liable to the other shippers as the agent of all.

Many other instances might be cited establishing that a conformity to the demand of the appellant would have been a breach of the duty which the Master owed to all the other shippers as well as to the owner of the boat itself.

We, therefore, respectfully contend that even if a proper demand had been made upon the ship and the Master for a delivery of the cargo at the port of Colon, and the Master had conformed therewith, that such action would have been the exercise of a inconsiderate judgment and an abuse of the discretion which was vested in him. It would likewise have been a breach of the duty which he owed to the other shippers, and to the owner of the ship, not only as a matter of contract covenant, but likewise as a matter of general law.

We further contend that the act of the Master in finally transhipping the cargo at the cost of the appellant was an act which was not only in conformity with the conditions and covenants of the bills of lading under which the goods were shipped, but which was likewise in accordance with the duty imposed upon the Master as a matter of general law, and that in accomplishing the task of such transhipment, the Master was acting as the agent of the appellant, and

that, therefore, the appellant is precluded from establishing any liability against the steamship for the acts of its own agent.

A mere reading of the history surrounding this novel voyage should convince a disinterested mind that the Master of the Steamship "Eureka" exhibited a sound judgment and exercised a most exemplary discretion. Those who complain of his acts, complain not of the discretion which he did, in fact, exercise, but complain on the contrary because he did not abuse his discretion in the interest of a single shipper.

If the Master of the Steamship "Martha" had been confronted with the uncertainties which confronted the Master of the "Eureka" it is very doubtful whether the District Court for the District of New York, or any other court, would have held the ship liable for failure to conform to a demand for a delivery of the cargo. It must be remembered that in the case of "The Martha", the delay was fixed and certain. It must likewise be remembered that she was in a port where adequate facilities for discharging existed. It must likewise be remembered that an offer was made to protect her against all future contingencies.

The alleged liability of the steamship in the case at bar should be viewed from the standpoint of all the extraordinary conditions which surrounded the "Eureka" and her cargo, at the Atlantic entrance to the Panama Canal. The new and uncertain condi-

tions which were created by a new and uncertain waterway should be constantly kept in mind.

To hold that the appellant in this case could establish a liability against the steamship upon the basis of the record as presented to this court would be to contravene the long established principle requiring precise and exact proof as a ground work for the implication of an agency to handle the vital interests of another, and allow persons to be charged with the acts of third parties, concerning which they had no knowledge, because the appellant's own witness said:

> "I had no authority other than as booking agent."
>
> (Testimony of Mr. Kurz, Libelant's Exhibit 1, page 151.)

To sustain the contention of the appellant in the case at bar, would be likewise to hold that the solemn provisions of a bill of lading made for the express purpose of protecting a carrier against unforseen contingencies, could be brushed aside at will whenever such contingencies arose.

To sustain the contention of the appellant in the present case, would be likewise to over-throw the long established doctrine of the discretion which necessity has for centuries vested in the Master of a ship.

Conditions such as the closing of the Panama Canal do not often arise, any more than such conditions as confronted the Master in the case of the North German Lloyd vs. Guaranty Trust Company, when the problem of a world war was imminent but unsettled.

The rapid development of physical science, however, and the close union which that science is creating among the nations of the world, invites a continual increase of such channels of commerce as the Panama Canal, and with such development, are bound to ensue serious conditions such as the slides which occurred during the history of the present case, and the only possible way to meet such conditions is to continue the recognition of that powerful responsibility reposed in the Master of a ship through the ages of the maritime law.

Such a recognition of responsibility, carries with it the necessity of a wide discretion to give it full effect, and such discretion when once exercised on the basis of a reasonable judgment, should be protected insofar as it is possible by the courts, which enforce the principles of maritime law.

The recent case of The Kronprinzessin Cecilie (244 U. S. 12), presents the latest and most rigid recognition of a Master's discretion rightly exercised, and goes so far as to say that the threatened impediment need not even have occurred if all the surrounding circumstances were sufficient to satisfy the mind of a reasonable Master that a strong probability of their occurrence was imminent.

As suggested by Mr. Justice Holmes in this decision, while discussing the proper attitude of courts to commercial contracts and commercial enterprises,—

> "business contracts must be construed with business sense."

Turning now to the question of the evidence which has been offered by the appellant for the purpose of establishing its claim for damages, we respectfully insist that no evidence whatsoever has been offered to show that any of the damages claimed were the direct and proximate cause of any act upon the part of the Steamship "Eureka", her Master, or her owners.

Appellant claims that the total value of the goods at the time of shipment was $10,653.14. Libellant's Exhibit I, page 82.

It is next claimed that the goods were sold for $7831.01. Libellant's Exhibit I, page 82.

It is then claimed that the difference between the price at which the goods were sold and their original value was $2822.13. Libellant's Exhibit I, page 82.

Mr. Mitchell testified on page 82, Libelant's Exhibit I, that this difference was due to the damage occurring on account of the goods being delayed at Colon instead of being turned over to the appellant.

It is next claimed that the appellant paid $401.43 as freight charges from New Orleans to Jersey City, which transhipment was for the purpose of rebuilding the cells. Libellant's Exhibit I, page 83.

It is also claimed that Mr. Mitchell as a representative of the appellant spent $261.81 as expenses in going to New Orleans to supervise the discharge of the cargo at that point.

It is also claimed that the appellant spent $414.40 at New Orleans to put the dry cells in shape to send them back to Jersey City.

It is also claimed that certain incidental expenses were incurred in connection with the discussion as to the transhipment of the goods, such as telegrams, telephones, etc., in the sum of $137.81.

It is then claimed that the difference between the original value of the goods and the price at which the goods were sold added to the expenses enumerated constituted a claim in the sum of $4037.58. Libellant's Exhibit I, page 86.

It is then claimed that owing to the delay at Colon, and the inability of the appellant to procure the dry cells for sale, the market price of the cells dropped in the sum of two cents per cell, making a total of $915.50. Libellant's Exhibit I, page 172.

It is then claimed that on the cells replaced the appellant paid $1312.66 for shipment from Cleveland, Ohio, to California points.

It is then claimed that the total of the market depreciation and the last freight referred to added to the depreciation in the market value amounted to $5718.77.

It is claimed in other words that the delay of the SS. "Eureka" at Colon by virtue of the slides in the Panama Canal damaged the appellant in the following particulars:

First: The appellant had to sell the original cargo for less than it would have otherwise have sold the cargo.

Second: Expenses incurred by way of additional freight, expenses incurred in going to New Orleans, expenses incurred in rebuilding cells at New Orleans, and incidental expenses, all totalling, $1215.45.

Third: The drop in the market price of cells of two cents per cell, totalling, $915.50.

Fourthly: The freight paid from Cleveland, Ohio, to California for replacement of cells, $1312.66.

The recovery of all of the above items is based upon the alleged refusal of the steamship to deliver the goods at Colon, and it is claimed that the delay at Colon produced these alleged damages. This presents a question for determination under the undis-

puted evidence as to whether or not this delay was the direct, efficient, and proximate cause of the loss alleged to have been sustained by the appellant.

The rule applicable to situations of this character was very elaborately discussed by the Circuit Court of the United States for the District of Kansas in the following decision. The case arose out of an action against a railroad company for damages alleged to have been caused by the railroad company on account of unnecessary delay resulting in the injury to cattle by a flood. The facts are summarized in paragraph 4 of the syllabus, and, therefore, we submit the same verbatim:

> "Defendant railroad company had a large shipment of cattle owned by plaintiffs, to be taken over its line and delivered to a connecting carrier at Atchinson, Kan. Owing to floods, it was unable to reach that place with the shipment, and was also notified by the connecting carrier that it could not receive and forward the cattle from there, because of washouts on its line. Neither road had yards in which they could be placed at Atchison and defendant arranged with another company to forward them from Kansas City, and took them there, placing them in the stockyards. These yards had been in large use for many years, and, while the Kaw river, near them, was known to be very high, no flood had ever extended to the yards. However, on the night after the cattle were placed therein an unprecedented rise occurred—many feet

higher than had ever been known before—doing an immense amount of damage to property of all kinds in the valley and flooding the stockyards. To prevent the cattle from drowning, they were driven into overhead viaducts leading from one portion of the yards to another, where they remained for more than a week; a large number dying from starvation, and the remainder being seriously injured."

The court in holding against the claim of the consignor and in favor of the carrier laid down the following very instructive review of the subject of proximate cause and its relation to damage:

"Under the undisputed evidence, what was the direct, efficient and proximate cause of the loss sustained by plaintiffs? The defendant contends, 'the act of God.' The plaintiffs contend, 'the negligence of defendant.' Which contention is correct?

It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury; but, before plaintiffs may recover in these actions, it devolves upon them to trace the loss which they have sustained to the negligence of the defendant, as the direct and proximate cause of the injury.

While the authorities in this country are not in harmony upon this proposition, yet the fed-

eral decisions all agree therein. In Chicago, St. P., M. & O. Railway Company v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582, Judge Sanborn, delivering the opinion, says:

> 'The rule of law which governs this case is not difficult of statement, but, like many other rules, the difficulty is solely in its application. "Causa proxima non remota spectatur." An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been forseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it but for the interposition of some new, independent cause, that could not have been anticipated. Obviously, the relation of causes to their effects differ so widely and are so various that no fixed line can be drawn that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case as it arises. The effect sometimes follows immediately upon its moving and proximate cause, and, again, that cause works out its effect with unerring accuracy after a long period of years.'

"In Railway Company v. Kellogg, 94 U. S.

469, 24 L. Ed. 256, Mr. Justice Strong, speaking for the Supreme Court, said:

> 'It is generally held that in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of the attending circumstances.'

"In Hoag v. Railroad Co., 85 Pa. 293, 27 Am. Rep. 653, it is said:

> 'The true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrending circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the act.'

In the light of these and other authorities, and the undisputed evidence in these cases, have the plaintiffs so alleged and proven?"

Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 135 Federal Rep. 135, 140-141.

Applying the rule laid down in the case last cited

to the facts of the case at bar, the question arises as to whether or not the damage alleged to have been done was the direct and proximate cause of any negligence upon the part of the steamship.

The undisputed evidence shows that the SS "Eureka" was delayed at the entrance to the Panama Canal by virtue of slides, and unable to pass through the Canal in completion of its contemplated voyage.

We respectfully contend that the primary and proximate cause of the delay at the Atlantic entrance of the Panama Canal was the slide and not any negligence or act upon the part of the steamship.

In fact, the only other cause which has been alleged, or attempted to be proved, is the alleged refusal of the steamship company to deliver the goods at Colon. As already shown, however, no demand was made upon the steamship or the master for such delivery, no average bond tendered to protect the steamship against the claims of other shippers, and no provision made for discharging the cargo, assuming a proper demand had been made.

It further appears that the United States Government prohibited the discharge of any cargo at Colon unless a guarantee as to immediate transhipment across the Isthmus and immediate transhipment from there over the waters of the Pacific was given.

In view of these facts, we respectfully submit that none of the damages alleged, or attempted to be proved, in this case can be traced to any act of the ship as the proximate cause thereof.

Turning now to the fourth sub-division set forth above, we contend that there has been no sufficient proof of any damage whatsoever. As already shown by the facts above stated, the bill of lading provided that the carrier should be exempt from liability from:

(Sec. 3, Bill of Lading, Libellant's Exhibit 3.)

> "Insufficiency of package in strength or otherwise, * * * rust, * * * leakage, breakage, sweat, blowing, bursting of casks or packages from weakness or natural causes, evaporation, vermin, frost, heat, smell, contact with or proximity to other goods, natural decay or exposure to weather."

This is a stereotyped form of provision usually contained in bills of lading, and has been many times upheld by the courts. The parties to this controversy contemplated by the bills of lading and the contracts of shipment that the goods were to pass through the Panama Canal. This contemplated that the goods would have to go through the torrid zone. In fact, the evidence of this case establishes that the dry cells were constructed in certain special particulars to meet this very exigency.

Under such circumstances, the carrier will be undoubtedly exempt from damage resulting from heat. This rule was laid down by the Circuit Court of Appeals for the Second Circuit in connection with an action against a ship containing a shipment of shellac from Calcutta to New York made under a bill of lading exempting liability from loss or damage from heat. It was contended that the material was subject to an unusual high degree of heat which caused it to fuse together. The Circuit Court of Appeals in reversing the lower court and dismissing the libel rendered the following decision:

> "Lacombe, Circuit Judge. The bill of lading contains an exception of 'loss or damage * * * from * * * heat or fire on board, in hulk or craft, or on shore.' The District Court found that the injury to the shellac was undoubtedly caused by heat, and the evidence abundantly sustains that conclusion. Therefore the burden of establishing some negligence of the carrier rested upon the libelants, because, the injury having resulted from an excepted cause, the carrier was not responsible unless his own negligence was affirmatively shown. Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; The Patria, 132 Fed. 972, 68 C. C. A. 397.
>
> We are unable to concur with the District Court in the conclusion that such negligence is to be inferred from the fact that the condition of the shellac on the ship's arrival showed that

it must have been subjected to an very unsually high degree of heat. That it was, and would in the nature of things, be subjected to a very high degree of heat on the voyage, especially through the Red Sea, is shown by the proof. That a very large part of it fused and ran together, although stowed in a particularly well-ventilated part of the ship, might indicate either, as the district judge inferred, that the ventilating apparatus was not properly employed or that this particular lot of shellac was of a grade peculiarly susceptible to heat, and thus fusible at a temperature lower than that to which it would be exposed with all proper attention to hatches and ventilators. Under the rule laid down in the cases cited we cannot find that there was negligence of the ship, which would deprive it of the benefit of the exception as to loss or damage from heat.

The decree is reversed, with costs, and cause remanded, with instructions to dismiss the libel, with costs."

The St. Quentin, 162 Fed. 883, 884.

Mr. Anson J. Mitchell, the Traffic Manager of the appellant, testified as follows:

"Q. Did the marks indicate anything as to the quality of the goods at the time they were

shipped from your factory as to whether they were first class or not?

A. Well, not the marks, except that we knew from the marks that they were special cells made under special instructions, which cover long distance cells.

Q. Then the marks indicated that these cells were long distance cells, is that right?
A. Yes."

(Testimony of Anson J. Mitchell, Libelant's Exhibit 1, pages 55-56.)

Mr. Edwin J. Wilson, Manager of the Eastern Works of the National Carbon Company, testified, amongst other things, as follows:

"Q. When these goods left your factory were they of a class that was suitable for shipping for export or for California ports?

A. No.

Q. For what reason?

A. We did not consider them good enough for shipment to those points. In fact, we made it a point not to ship any, not even to southern points where the climate is warm.

Q. Does it require a specially high grade of batteries for export to California points?

A. Yes. It does."

(Testimony of Edwin J. Wilson, Libelant's Exhibit 1, page 100.)

Mr. William A. Richey, a chemist in the eastern works of the National Carbon Company, testified, amongst other things, as follows:

"Q. You have examined shipments of cells that have come through the tropics, and through locations similar to the Canal zone, have you not?

A. I have seen cells that have been through the tropics.

Q. Did such cells, under ordinary conditions of carriage, show signs of deterioration by heat?

A. They did not. We make our cells to stand the ordinary conditions of transportation through the tropics. The seal is made at a melting point high enough so that it will stand tropical temperature, or wherever we ship that particular cell."

(Testimony of William A. Richey, Libelant's Exhibit 1, pages 115-116.)

As already shown by the reference above set forth to an excerpt from the bills of lading, the steamship was protected from liability from damage arising from "heat". Therefore, in the language of the case last cited, the burden of establishing some negligence on the part of the "Eureka" rested upon the appellant because the injury resulted from an excepted cause.

As shown by the testimony above set forth, it was contemplated by the appellant that the goods in question would pass through the tropics, and would be subject to a very high degree of heat. For this reason, the cells were made purposely to meet this exigency. The burden, therefore, according to the ruling of Circuit Judge Lacombe, rested upon the appellant to show that there was some negligence on the part of the ship which would deprive it of the benefit of the exceptions as to loss or damage from heat.

The only evidence appearing in the record in this case is the conclusion of the various witnesess produced by the appellant to the effect, that in their opinion the condition in which they found the cells at New Orleans must have been caused by excessive heat. This was the testimony of Mr. Anson J. Mitchell, the appellant's own Traffic Manager. The testimony was as follows:

"Q. From the conditions you saw, what did you conclude was the cause of the damage?

A. I concluded they had stayed in the hold of the ship where it was too hot.

Q. What else happened, anything?

A. Practically that is all, and the delay of course, naturally being old cells, not strictly fresh cells."

(Testimony of Anson J. Mitchell, Libelant's Exhibit 1, pages 57 and 58.)

Mr. William A. Richey testified as follows:

"Q. Could you judge in this case what was the cause of the excessive internal action?

A. My opinion of the matter is that the action was caused by a long period of exposure to rather excessive heat. That is what the indication showed on examination of the cells."

(Testimony of William A. Richey, Libelant's Exhibit 1, page 113.)

Mr. Richey likewise testified as follows:

"A. We found on removing the cells that the

greater part of the cells showed straw marks that is, marks as to the impression made by the straw on the seals, which is only caused by the seal softening under the influence of heat."

(Testimony of William A. Richey, Libelant's Exhibit 1, page 109.)

It thus appears that all the damage claimed by the appellant to the cargo in question was, on its own theory, caused by heat, which was one of the exceptions contained in the bills of lading, and under said exception the carrier was protected from damage to goods on account of heat.

The only evidence offered to show any negligence upon the part of the Steamship which would deprive it of the right to claim this exemption is the testimony offered to show that the ship delayed too long a time at the Atlantic entrance to the Panama Canal.

As already set forth, however, we respectfully contend that this very delay was caused by an unavoidable contingency, for which the carrier was not responsible, and the period of delay was reduced to a minimum by the exercise of reasonable discretion on the part of the Master.

In view of the fact that the appellant knew the cargo was going through the tropics, we contend that the case at bar comes directly within the ruling

laid down in the case of the St. Quentin, 162 Fed. 883, 884, above set forth.

It must always be remembered that the appellant in this case has never at any time claimed or offered any evidence to show that the goods in question were improperly stowed. Therefore, there is no basis upon which the appellant can claim that the steamship was guilty of such negligence as to preclude it from claiming the benefit of the exceptions of the bills of lading exempting it from damage to cargo caused by heat.

The appellant has failed to establish the making of any proper demand on the Steamship "Eureka" for the delivery of the cargo at the port of Colon. Therefore, the decree of the lower court should be affirmed.

The appellant has failed to show that the Master abused his discretion in dealing with the situation out of which the present controversy arose, and, therefore, it should be held that the Master exercised a reasonable discretion, and such discretion should be supported by a decree in favor of the steamship.

The appellant has failed to establish that any act of the ship was the proximate cause of the damage which it alleges was done to its cargo. Its claim in this particular must, therefore, fail.

The only proof offered by the appellant to show any damage whatsoever, is proof that the cargo was damaged by heat. Against such a claim, the steam-

ship was protected by the provisions of the bills of lading, and no evidence has been offered to show that the steamship was guilty of any negligence which would preclude it from claiming the benefit of this exception in the bills of lading.

Very respectfully submitted,

PLATT & PLATT,

HUGH MONTGOMERY,

FARRELL, KANE & STRATTON,

Proctors for Appellee.

No. 3102

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL CARBON COMPANY,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY,
(a corporation),
Appellee.

REPLY BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO.

Index to Cases Cited.

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REPLY BRIEF FOR APPELLANT.

The appellee seems to rely in its brief on the theory that the master of the "Eureka" used his discretion as to how long the "Eureka" should wait at Colon. The fact is, however, that the master did not use his discretion, but acted under the orders which he received from Kurz of Rubelli's at Philadelphia. If the court will read the various cables which were received and sent by the master of the "Eureka", we believe that it will be convinced that we are correct. If we are correct the appellee's whole defense fails. The first cable sent by Baggott, the master of the "Eureka" was the following—Libellant's exhibits 43 and 43A:

"Rubelli
Philadelphia
Arrived all right September 28th do not expect to leave before October 10th. Further information cannot be obtained. Looks very bad. *Advise you* consult Washington.

Baggott".
(Italics are our own.)

The next cable, libellant's exhibit 49, was also addressed to Rubelli at Philadelphia. The next cable, libellant's exhibit 53, dated October 11th, is addressed to Rubelli at Philadelphia. The next cable, libellant's exhibit 54, received October 11th by Rubelli's at Philadelphia from Captain Baggott is in the following language:

"Rubelli Colon
Philadelphia
Referring to your telegram of the 11th official information will be given out tomorrow morning Canal will not open November 1st informed will be advised (advisable) do not wait any longer. *Would advise you to discharge cargo here transship cargo to Pacific port* Send us back for another load. It will take about seventy days via Straits of Magellan.

Baggott".
(Italics are our own.)

Note * * * If the master were acting on his own discretion he would have discharged the cargo at Colon on October 11th, as he knew at that time that it was useless to wait longer. But what does he do? He

merely gives Rubelli's his opinion and leaves it to their judgment as to what to do.

On October 15th, Baggott sent Rubelli's the following cable:

"Rubelli Colon
Philadelphia
Following information is from a reliable informant Canal probably will not be open before January First This information is confidential I cannot mention name of my informant There is every reason to believe the information is correct Impossible to obtain definite information".
Baggott
Oct. 15 1915."

Note * * * If the master were exercising his own discretion, is there any doubt that he would leave Colon on October 15th at the time when he sent this cable?

The next cable, libellant's exhibit 71, is dated October 29th, sent by Charles Kurz to Baggott, authorizing Baggott to make arrangements for transshipping the cargo. This cable is sent from Portland, Oregon, and is signed "Charles Kurz".

Note * * * If the master had authority to make such arrangements, how unnecessary was this cable!

On November 3rd, Kurz cabled Baggott, libellant's exhibit 72, inquiring whether he had been able to make the arrangements proposed. Baggott, on November 4th, libellant's exhibit 73, cabled in reply:

"Kurz, Portland.
Start Will not agree to your proposal Can sail tomorrow morning for New Orleans *Telegraph instructions* who are your agents at New Orleans.
Baggott".
(Italics are our own.)

If as is stated in the brief for the appellee the master was exercising his own discretion, why does he ask Kurz to telegraph instructions?

It was in reply to this cable that Kurz sent the cable (libellant's exhibit 74), which was referred to in our principal brief, directing Baggott to proceed to New Orleans. We have already pointed out that the District Court misread this cable. Appellee's counsel suggests that the cable was not misread by the District Judge, but that the District Judge's stenographer made an error in transcribing the cable in the court's opinion. If the District Judge did not misread the cable, why did he say:

"This telegram I interpret as from both the Oregon-California Shipping Co. and Mr. Kurz, as the representative of L. Rubelli's Sons".
(Opinion p. 73.)

It is to be noted that the "Eureka" did not leave Colon until Baggott received this cable from Kurz signed by him only, instructing him to do so.

It is submitted that this documentary evidence shows conclusively that the master did not exercise *his discretion* as to the length of time that the "Eureka" should wait at Colon but that the only person who exercised such a discretion was Kurz of Rubelli's.

The appellee also contends that the libellant made no complaint in the District Court nor did it argue in the District Court that the "Eureka" should be liable for her unreasonable delay. On pages 40 to 49 of our brief in the Court below the matter of the unreasonable delay of the "Eureka" was made the subject of a special section and was designated "Point IV". A copy of this brief was served on counsel for the appellee when the case was before the District Court and the original copy is now or should be with the District Court. In order to direct this court's attention to the argument made in the court below, we have printed the section in question as an appendix to this brief. It will be found that the language used by us in making our argument before the District Court is identically the same language as that of the brief which we have filed in this court. In face of this evidence can there be any doubt that the point was raised and fully discussed in the District Court?

Moreover, since the decision of *Reid v. Fargo,* 241 U. S. 544, 548, it is established that an appeal in Admiralty is a trial *de novo* and that the appellate court can review the entire case.

The law has been settled since the case of *Clark v. Barnwell,* 12 How. 272, that in a suit in Admiralty against the carrier for failure to carry, all that need be alleged in the libel is that the goods were delivered to the carrier in good order and condition and were delivered by the carrier in bad order and condition. In *Clark v. Barnwell,* supra on page 280, the Supreme Court of the United States said:

"After the damage to the goods, therefor, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to duty".

In the present case the libellant alleges, record pages 7 and 8, that they delivered the goods to the vessel in good order and condition, and on page 10, that after a lapse of several weeks after the requests and demands of the libellant had been made, the cargo was delivered to the libellant in bad order and condition. This libel is drawn in accordance with the practice which has prevailed ever since the decision of *Clark v. Barnwell, supra.*

In *Dupont v. Vance,* 19 How. 162, the Supreme Court had before it a case where a libel had been filed for non-delivery of cargo. The defense of peril of the sea was set up and the court held that the cargo was lost as a result of peril of the sea. Notwithstanding the fact that no claim had been made in the libel for a general average contribution from the vessel the court allowed a recovery of such a contribution.

The *St. Quentin,* 162 Fed. 883, upon which the libellant so strongly relies, is distinguishable from the case which we now have under consideration. That was a case which did not involve delay, but ordinary heating of cargo in a vessel's hold. If the court will read the reported opinion in that case, it will observe that the heating occurred while the ship was passing through the Red Sea in the ordinary course of her voyage. As pointed out in the case of *The Indrapura,* 171 Fed. 929, cited in our principal brief, an unwarranted delay constitutes a deviation, and that when a vessel has deviated from her voyage she is no longer entitled to the benefit of the exceptions contained in the bill of lading.

We pointed out in our principal brief that the heating of the "Eureka's" cargo was the result of a delay which was occasioned by a dispute between the owners of the "Eureka" and the Oregon-California Shipping Co., her charterers (see a letter addressed to Rubelli's by the Oregon-California Shipping Company, page 33 of our brief). The following excerpt from claimant's exhibit K also shows that the delay at Colon was the result of such a situation:

> "So we will only ask you to help us bring about a solution of the matter. Should we discharge this cargo at Colon under the present conditions, *it would possibly serve to relax the energies of the Crossett Western Lumber Co.* and we do not care to take it upon ourselves to be responsible without any chance of gain when the Crossett Western Lumber Co. is holding the bag".

It is believed that the evidence shows overwhelmingly that the cause of the "Eureka's" delay was iden-

tical with the cause of the delay in *The Covetina,* 52 Fed. 156, viz. a dispute between charterers and owners.

The appellee says the proximate cause of the damage to appellant's goods was not the delay, but the slide in the Canal. We submit the evidence shows conclusively that this was not the fact but that the cargo was damaged by heat because of the long delay of the vessel at Colon. It is to be noted that no effort was made by the appellee to rebut this evidence.

Appellee also argues that the letter of October 25th (libellant's exhibit 17) shows that Mr. Mitchell knew that Rubelli's was not the agent of the Oregon-California Shipping Company. If the court will read the letter referred to, it will find that the first part of the letter is as follows:

> "Oregon California Shipping Co.
> Railway Exchange Bldg. Portland, Ore.
> Confirming notice to your *agents Rubelli,* Philadelphia, in person October ninth, by telephone October fourteenth."
>
> (Italics are our own.)

It is submitted that so far from showing that Mitchell did not regard Rubelli's as agents of the Oregon-California Shipping Company, the letter shows conclusively that Mitchell described Rubelli's as the agent of the Oregon-California Shipping Co. The record may be searched in vain for an answer from the Oregon-California Shipping Company, denying that Rubelli's was its agent.

Appellee also says that it was impossible to discharge the cargo at Panama. There is no proof in the record to this effect. On the contrary Mr. Mitchell has testified that he could have made arrangements to bring the cargo back from Panama to New York. It is to be remembered that when the ship arrived at New Orleans that Mitchell took possession of his goods there. He did not send his goods to the Pacific Coast, but the brought them back to New York for the purpose of reconditioning them.

Appellee also makes much of the fact that Kurz was called as a witness by the appellant. If the court will examine the record at page 3, it will find that the appellee served notice on the libellant that it intended to take the testimony of R. H. Baggott, H. M. Williams and Charles Kurz. It was not until the appellee failed to take Kurz's testimony that the appellant did so. We do not understand the rule of evidence to be that a party who calls a witness cannot attack the conclusions drawn by that witness as to his relations with other parties. As we understand the rule it merely provides that when a party calls a witness, he cannot impeach him or attack his credibility. We have not attacked the credibility of Mr. Kurz nor are we seeking to do so. We are merely pointing out that when he says that he was acting merely as soliciting freight agent, his conclusion as to his legal relation with the Oregon-California Shipping Company does not square with the facts as shown by documentary proof secured from him.

In *McLean v. Clark,* 31 Fed. 501, Judge Henry B. Brown (afterwards of the Supreme Court of the United States) said:

> "While it is undoubtedly true, as a general rule, that a party offering a witness in support of his case represents him as worthy of belief, and will not be permitted to impeach his general reputation for truth, or impugn his credibility by general evidence, he has never been considered as bound by his general statements as to motives or intention, or his bona fides in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify".

The appellee has also attempted to make much of the fact that Mr. Mitchell was seeking to have his goods forwarded to California and that, therefore, Mitchell's testimony as to the demand for delivery of his goods at Colon should be viewed with suspicion. If the court will read the record, it will find that the testimony of Mr. Mitchell is absolutely supported by Kurz. Kurz states without qualification that Mr. Mitchell did demand that his goods be delivered to him at Colon. It appears from libellant's exhibit 66, a telegram dated October 18th, that Kurz informed the Oregon-California Shipping Company that the National Carbon Company offered to pay all expenses of discharging, including loading back on board any other goods, in order to forward their goods from Colon. If this offer made by the National Carbon Company contemplated any other arrangement than that which has been testified to by both Mr. Mitchell and Mr. Kurz,

the appellee certainly could have secured some proof to substantiate its contention from Mr. Williams, the other person who was familiar with the entire transaction. It is to be noted that the appellee has failed to call Mr. Williams to testify, although it served appellant with notice that he intended to take Mr. Williams' deposition (see the record page 3). If there is any ground for regarding either party with suspicion, the party who has failed to produce any proof is the party who should be regarded with suspicion. See the case of *The Gladys*, 144 Fed. 653-655, where the court says:

> "So far from showing that extraordinary care was exercised by those in charge of the navigation, the owner of the tug and tows (the whole flotilla belonged to the railroad company) has not called a single witness from the Carlisle, neither navigator, wheelsman, lookout, or deckhand. This circumstance, in itself would seem to be sufficient to warrant the conclusion that whatever might have been the errors of others, she at least was in fault".

Aside from the foregoing, may we ask what else Mr. Mitchell could do but to use his best endeavors to have his goods forwarded, when Kurz, the man who was directing the movements of the "Eureka" and the man whom, as we have shown, was exercising that discretion which the appellee argues so strenuously should be exercised by the master, refused to deliver his goods to him. The goods were perishable. Naturally Mitchell would leave no stone unturned to pre-

vent their destruction. When Kurz arbitrarily refused to deliver them to him he did the next best thing, namely, he attempted to have the appellee get them away from Colon. The fact that Mr. Mitchell was entirely sincere in his demand for his goods because of their perishable nature is demonstrated beyond controversy by the fact that when the goods were discharged from the "Eureka" at New Orleans, he went there and took possession of them and returned them at once to New York.

The appellee also suggests that because in the case of *The Martha,* 35 Fed. 313, a tender was made of a general average bond, that that case can be distinguished from this case. We submit that there is no such distinction. In *The Martha* case, the vessel's machinery broke down and she put into a port of refuge, hence, large general average expenses were incurred. In this case there has not been the slightest suggestion that general average expenses were incurred at Colon. There was no sacrifice for the common benefit; there was no loss of a general average nature. It is significant that, when the goods were finally delivered at New Orleans, there was no suggestion that there had been a general average loss. No general average bond was demanded there and there has been no suggestion of a general average adjustment. It would have been futile, therefore, for Mr. Mitchell to have tendered a general average bond.

Counsel also says that it was known that there would be a long detention in *The Martha* case and that, in this case, the master was hoping against hope until Novem-

ber 4th that the Canal would be opened, when finally he exercised his discretion to return to New Orleans. We have shown from the master's own cables that he did no such thing; that he waited at Colon for orders from Kurz, the man upon whom Mitchell made his demand. The master knew as early as October 11th, nearly a full month before he received orders from Kurz to go to New Orleans, that there was no hope of passing through the Canal. In this case, therefore, the master knew on October 11th that there would be a *long delay* at Colon.

It is also stated in appellee's brief that the demand in *The Martha* case was made on the owner. If the court will read *The Martha* case it will observe that demand was made on the owner

"through his agent in New York".

We submit that when a shipowner or charterer elects for his own benefit to keep perishable cargo in the hold of a vessel in the tropics for his own benefit and in the face of the protests and demands of the cargo owner, he should be compelled to bear the consequences.

Respectfully submitted,

HOWARD S. HARRINGTON,
T. CATESBY JONES,
WILLIAM DENMAN,
Proctors for Appellant.

HARRINGTON, BIGHAM & ENGLAR,
DENMAN AND ARNOLD,
Of Counsel.

(APPENDIX FOLLOWS.)

APPENDIX.

(Point IV of libellant's brief filed in the District Court.)

Point IV.

THE DELAY OF THE STEAMER AT COLON WAS UNWARRANTED.

It is well settled that a vessel with perishable cargo on board is responsible for damage caused by unwarranted delay:

The Queen, 28 Fed. Rep. 755;

The Coventina, 52 Fed. Rep. 156;

Schwarzschild v. National Steamship Co., 74 Fed. 257;

Propeller Niagara, 21 How. 7;

The Gutenfels, 170 Fed. Rep. 937.

In *The Coventina* the court said:

> "So here, when it was found that this ship had been seized and could not be released, except at great risk to the owners, until the end of an uncertain litigation, *reasonable consideration of the shipper's interests required either that the goods should be transhipped to their destination by some other vessel, or else that the shipper should be notified of the liability to delay, and the privilege given him to reship at his option. In default of this the ship took on herself the risk of loss by delay,* with the right of recourse to the charterers for indemnity."

The Supreme Court, in *Propeller Niagara* (21 How. 7) said (p. 27):

> "Safe custody is as much the duty of the carrier as conveyance and delivery, and when he is unable to carry the goods forward to their place of des-

tination from causes which he did not produce and over which he had no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel in King vs. Sheperd, 3 Story, (C. C.) 388, to maintain the proposition assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction this doctrine and held that his obligation, liabilities and duties as a common carrier still continued and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract as universally understood in the courts of justice."

See, also, *The Maggie Hammond*, 9 Wall. 435.

As early as October 12th (libellant's exhibit "59"), the steamship company was informed by Rubelli that the Canal would not be open on November 1st, and that it was impossible to say when it would be opened. After that time telegram after telegram was sent it urging that something be done with the steamer and her cargo. No orders were given to the master of the "Eureka" to proceed until November 4th (libellant's exhibit "54"). The only excuse for this delay is contained in Libellant's Exhibit "47", a telegram from

Oregon-California Shipping Co., Inc., addressed to Rubelli. That telegram is as follows:

> "*Do not make arrangements to transfer Eureka cargo as owners will not permit us to place ship on Atlantic trade* stop. Our best legal talents pronounce slides act of God and state we are exempt from payment during detention what is your opinion see section three Act of Congress February thirteenth eighteen ninety three."

As was said by the court, in the case of *The Coventina,* 52 Fed. Rep. 150, cited above, the owner of the cargo was not interested in the dispute between charterer and owner as to the trade in which the ship should be used. The ship was bound to the goods to fulfill her contract of affreightment. Knowing as they did the character of the cargo (and the Oregon-California Shipping Co., Inc., knew this as well as Kurz. See National Carbon Company's telegram of October 18th to Oregon-California Shipping Co., Inc., informing it of the perishable nature of the cargo) it was the duty of the Oregon-California Shipping Co., Inc., to either deliver the cargo *at once* to the National Carbon Company in accordance with its demand, or to bring the ship to some port where proper transhipment arrangement could be made. It certainly had no right to delay until November 4th before making a decision merely because the owners of the vessel would not permit her to be used in the Atlantic trade. It should have discharged the cargo at once at Colon or it should have brought the steamer forthwith to some American port where the cargo could be discharged.

The court will observe from an examination of libellant's exhibits 45 and 46, that respondents knew as early as October 5th, that no arrangement could be made for the transhipment at Panama. Under these circumstances, what possible excuse can there be for waiting a full month at Panama before making the decision to bring the vessel to New Orleans?

The claimant takes the position that the libellant is not entitled to recover damages because the delay in delivery after libelant's demand for delivery at Colon, was expressly exempted by the bill of lading.

The cases which we have cited above show conclusively that the bill of lading exemption does not refer to such a delay. The only delay which a carrier can legally exempt himself from is an unavoidable delay. The delay in delivery of the goods was not unavoidable but was for the purpose to permit the owners and charterers to come to some decision as to the future use of the vessel. The telegrams passing between the Oregon-Shipping Co. Inc. and Rubelli establish this fact. Should libellant suffer because of the delay in reaching a decision?

The claimant further says that the damage was not the natural and proximate cause of the refusal to deliver. The testimony of the libellant conclusively shows that it was. This testimony has not been rebutted.

It is obvious that the cargo at Colon was damaged by heat. Libellant's witnesses have testified that the longer the vessel remained at Colon the worse the heat in the holds became. Obviously toward the end of the

time the vessel was lying at Panama the deterioration from heat became a real danger. If the vessel had left Colon when it was known that the cargo could not be transhipped, libellant's witnesses testify that there would have been no damage.

The case of *St. Quentin,* cited by our opponents, refers to an entirely different state of facts. That was not a case of refusal to deliver cargo on demand. It was a case of damage to cargo caused by heat while the ship was proceeding on her voyage through the Red Sea. In the present case the vessel was at rest (see Coxon's testimony as to the increase of heat in a ship's hold while she is at rest). There was no unwarranted delay in the *St. Quentin* case. An unwarranted delay constitutes a deviation (*The Indrapura,* 171 Fed. 929, 932). In cases of deviation a carrier is not entitled to the benefit of bill of lading provisions *(Globe Nav. Co. v. Russ Lumber & Mill Co.,* 167 Fed. 228).

All of the items of damage claimed with the exception of the claim for freight, amounting to one thousand, three hundred, twelve and 66/100 ($1,312.66) dollars, freight paid from Cleveland, Ohio, to California for replacement of the cells, we unhesitatingly say are proper items of damage.

The item of two thousand, eight hundred twenty-two and 13/100 ($2,822.13) dollars represented the actual deterioration in the goods after they were reconditioned. There can be no question of this item.

Item four hundred one and 43/100 ($401.43) dollars was part of the reconditioning cost of the goods. The goods could not be reconditioned in New Orleans and

had to be brought to Jersey City for that purpose, hence the freight paid to bring them from New Orleans to New York was an unavoidable reconditioning expense.

The same may be said of the expenses of Mr. Mitchell, two hundred sixty-one and 81/100 ($261.81) dollars, for proceeding to New Orleans and four hundred fourteen and no/100 ($414.00) dollars, his expenditures in New Orleans to put the cells in such condition that they could be transported to Jersey City. A reading of the testimony will convince the court that Mr. Mitchell's presence in New Orleans was absolutely necessary to insure proper handling of the damaged goods. Likewise, the cost of telegrams, one hundred thirty-seven and 81/100 ($137.81) was an essential item of expense. The loss in the market value of the goods due to the decline in price is also a proper element of damage (see the last paragraph in *Swift v. Furness, Withy & Co.*, 84 Fed. Rep. 345, 349). If the goods had been delivered when first demanded they could have been brought to New York and there sold before the market declined.

And see *The City of Para*, 44 Fed. 689, 691, where the court says:

> "The damages provable against the fund will include the loss of the perishable cargo, made worthless by the delay and thrown overboard, as well as the partial damage to what was brought into port; and also all the costs and charges attending the salvage of the cargo,—that is to say, its proper proportion of the aggregate cost and charges up to the time of its arrival here, as well as any further damage, if any, by reason of any difference in

market price from the delay in arrival. *The Giulio,* 34 Fed. 909; *The Belgenland,* 36 Fed. 504; *The Caledonia,* 43 Fed. 681."

As we have said before, we have some doubt as to whether the libellant is entitled to recover one thousand, three hundred twelve and 66/100 ($1,312.66) dollars, extra freight which he paid to carry the cells which he substituted for those which were damaged, from Cleveland to California.

We therefore submit that a decree should be entered in this cause against the claimant for the sum of four thousand, nine hundred fifty-three and 08/100 ($4953.08) dollars with interest and costs.

HARRINGTON, BIGHAM & ENGLAR,
REVELLE & REVELLE,
Proctors for Libellant.

T. CATESBY JONES,
Advocate.

3102

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NATIONAL CARBON COMPANY, a Corporation,

Appellant.

vs.

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "EUREKA," her Engines, Boilers, Tackle, Apparel, Furniture, etc.,

Appellee.

PETITION FOR REHEARING.

PLATT & PLATT,

Proctors for Appellee.

Metropolitan Press, Portland, Oregon

IN THE

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Appellee.

PETITION FOR REHEARING.

Petitions for rehearing are not infrequently looked upon, as purely perfunctory in character.

When an appellate court has carefully reviewed

the facts and rules of law involved in any controversy, its final decision should be looked upon with respect.

When, however, the record, brought before such a court, presents an intricate and lengthy statement of facts, and the court erroneously reads such statement, it becomes the duty of the practitioner, as a member of such court, to direct its attention to the error.

The practitioner's duty in this particular is emphasized in those instances where the proceeding in the appellate court is a new trial.

The Supreme Court of the United States has recognized the importance of such a situation, and has even gone so far as to allow a second petition for rehearing to be filed, in an instance where a first petition for rehearing had already been denied.

This happened in the case of American Emigrant Company vs. County of Adams, 100 U. S. 61.

The application, in that case, for a second petition for rehearing, was made by the famous lawyer, Benjamin F. Butler.

At the time of making such application, the Chief Justice of the United States asked General

Butler if he was aware of the fact that a petition for rehearing had already been presented and denied. This question was answered by General Butler in the affirmative.

Thereupon, the Chief Justice interrogated General Butler as follows:—

> "How many rehearings do you think ought to be permitted by the court in a given case?

To this inquiry General Butler replied:—

> "In the abstract, as many hearings as are necessary to establish the truth and justice of the case; in the concrete, as many as any gentleman fit to practice at your bar will peril his reputation by asking for."

It is interesting to note that General Butler's petition for a second rehearing was granted, and upon such rehearing, the Supreme Court of the United States unanimously reversed its first decision.

We, therefore, suggest that the granting of a rehearing, and a change of opinion, is not any evidence of weakness.

The opinion filed, in the case at bar, premises its final conclusion upon a brief review of the facts surrounding the shipment in controversy.

It will be remembered that on or about the 16th day of September, 1915, the Steamship "Eureka" set sail from the Port of Philadelphia for the Port of San Francisco, California, by the way of the Panama Canal.

It had on board, as part of a mixed cargo, certain shipments of dry cells, belonging to the National Carbon Company.

The bill of lading prescribed that the goods were to be taken by the Panama Canal route only.

On September 28th, 1915, the steamship reached the Atlantic entrance of the Panama Canal, but was prevented from passing through such canal on account of slides which had taken place therein.

The ship waited at the Atlantic entrance to the Panama Canal until November 4th, 1915, relying on advices from the United States Government that the canal would probably be reopened within a reasonable time.

On November 4th, 1915, the ship set sail for the Port of New Orleans, and there delivered to the National Carbon Company, its part of the cargo in question.

The National Carbon Company claims that it made a demand upon the agents of the steamship for a delivery of its cargo at the Port of Colon, and that such delivery was refused, to the damage of the National Carbon Company.

The decision of this court, after reviewing such facts, concludes with the statement that, in its opinion, the firm of L. Rubelli's Sons, upon whom the alleged demand was made, acted directly for the Shipping Company, and that the ship is liable for the damages by detention after refusal to deliver the goods at the Port of Colon.

While the conclusion of the court upon the question of general agency directly contradicts the statements contained in the letters which were offered in evidence by the National Carbon Company itself; and while such conclusion directly contra-

dicts the admissions of Mr. Mitchell, the Traffic Manager of the National Carbon Company, contained in his letter of October 25th, 1915; and while this conclusion directly contradicts the language contained in the letter of October 22nd, 1915, written by L. Rubelli's Sons, which this court has cited in support of the theory that L. Rubelli's Sons were general agents, whereas the letter itself denies, "any responsibility whatsoever for the actions of the steamer, her owners, charterers, or the Oregon California Shipping Company of Portland, or others concerned," and further states that the National Carbon Company had entered into an independent arrangement with the firm of L. Rubelli's Sons; nevertheless, we are compelled to accept this court's finding of fact on the question of agency.

On the other hand, we respectfully, but emphatically contend, that the court's legal conclusion of liability, based upon such assumed finding of fact, is unsupported by authority, and incorrectly assumes a state of facts not proven.

For example, on page 6 of the opinion filed in this case appears the following language:—

> "There were a number of ships plying between Colon and New

York upon some of which freight room could have been obtained."

We respectfully suggest that the record in this case establishes the contrary fact.

The evidence was as follows:—

Mr. Charles Kurz was one of the witnesses placed upon the stand by the National Carbon Company itself.

He is the man upon whom it is claimed that a demand for the delivery of the cargo at Colon was made.

It is this demand upon which the present proceeding is based.

It is this demand upon which the opinion of the court rests, and yet, this very gentleman testified, while upon the stand, as a witness for the National Carbon Company, that all efforts to procure a transhipment of this cargo were futile.

The proctors for the appellee in this case enumerated to Mr. Kurz the various transportation lines which were interviewed, in an endeavor to

procure a transhipment of the cargo, and the National Carbon Company, through its proctors, had full and ample opportunity to correct, upon redirect examination, any discrepancy in Mr. Kurz' testimony, but not a single effort was made in this particular.

This testimony of Mr. Kurz appears upon pages 142, 143, and 144, of Libelant's Printed Exhibit No. 1, filed as part of the record in this case, and reads as follows:

> "Q. Mr. Kurz, when the slide at the Canal continued after the arrival of the vessel for some little time, it is a fact, is it not, that your firm as well as the Oregon-California Shipping Co., at Portland, made a thorough investigation of all possible and practicable methods of dispatching the boat or cargo to the points of destination?
>
> Same objection.
>
> A. Our firm did, I don't know what the people on the Pacific Coast did.

Same motion.

Q. Now, in addition to the disclosures as to those efforts made by your firm, as shown by the exhibits heretofore put in evidence, by the libelant, your firm endeavored to arrange transshipment across the canal and transportation up the west coast with other carriers, did it not?

A. Yes.

Q. Among others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American - Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Steamship Company, the Panama Pacific Line at New York, the owners of the Edison Line at Boston, the Alaska Steamship Company, and Olsen & Mahoney?

A. Yes.

Mr. WELLES: Objected to, and

I move that the question and answer of the witness with respect to what was done for the forwarding of cargo other than libelant's be stricken out on the ground that it is incompetent, irrelevant and immaterial under the issues in this case.

Q. And as to your efforts with all of the transportation companies named in the last question as well as those named in the various exhibits placed in evidence by the libelant, you were unable to arrange for the forwarding of the cargo by rail either across the Isthmus or via the Tehuantepec Railroad because of the lack of carriers on the Pacific Coast to take the goods at the point of discharge on the Pacific side?

A. That is right, up to the time I got to Portland.

Same objection.

(By Mr. WELLES.)

Q. When did you get to Portland?

A. I arrived at Portland about November 1st.

Q. You were there only four or five days before the vessel came back?

A. Yes.

(By Mr. PLATT.)

Q. In addition to the efforts to arrange the transhipment of the cargo across the Isthmus and up the west coast, which proved impossible, for the reasons that you have already stated, investigation was made as to the taking of the vessel and cargo to the west coast through the Straits of Magellan, was there not?

A. Yes, sir.

Same objection.

Q. And the same had to be abandoned, is it not a fact, be-

cause being an oil-burner there was no supply of fuel oil on the east or west coast of South America to make it safe for her to make the trip?

A. That is right."

In addition to the above, Mr. Anson J. Mitchell, the Traffic Manager of the National Carbon Company testified, as a pure conclusion, that if the goods had been unloaded at Colon, they could have been transhipped back to the United States by other routes.

This testimony appears upon page 25, of Libelant's Printed Exhibit No. 1, and was as follows:

"Q. If those goods had been unloaded at Colon could they have been brought to the United States by other routes?

Mr. PLATT.—Objected to on the ground that the witness has

not shown that he knows anything about that.

A. They could have been."

As against this statement, which was a pure conclusion, Mr. Mitchell testified on cross examination that he had made no definite arrangements for the transhipment of this cargo, and that the only knowledge which he possessed as to the possibility of transhipment, was made up of opinions which had been expressed to him by certain steamship companies.

This testimony appears on pages 185 and 186 of Libelant's Printed Exhibit No. 1, and was as follows:

"Q. Were you ever at Colon?

A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the

libelant to handle that portion of the cargo of the S. S. 'Eureka' which was shipped by the National Carbon Company, during any time that the steamship 'Eureka' was detained at the east side of the Panama Canal?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial upon the issue in this action.

A. I had an arrangement with —I won't say an arrangement,— I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, the American-Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.

Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at

any time during the time that the 'Eureka' was detained at Colon, on the east side of the Panama Canal, for the handling of that portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes."

It further appears from the testimony of Mr. Kurz, that the Government of the United States would not permit the unloading of vessels detained at either entrance to the Canal, unless the parties so unloading had made definite arrangements to immediately tranship the cargo.

This testimony is very vital, and very important, and seems to have been entirely overlooked by this court.

It was as follows:—

"Q. It is a fact, is it not, that the government would not permit

the unloading of vessels detained at the Canal, either on the west coast or the east coast, unless the parties so unloading had definite arrangements made and carriers ready to take the cargoes when so unloaded?

A. It is."

(Libelant's Printed Ex. 1, pages 144, 145.)

The above testimony comes from the lips of the appellant's own witnesses.

The importance of the above evidence cannot be overestimated.

The court must take judicial notice of the fact, that the Port of Colon was a comparatively new port, from the standpoint of shipping on a large scale, and that the facilities for discharging cargo were, therefore, limited.

For this reason, and in order to prevent the ac-

cumulation of large quantities of cargo, the government of the United States was compelled to adopt a rule, requiring all carriers to have a definite arrangement for the transhipment of cargo, before they were allowed to discharge the same at the Port of Colon.

The government could not permit a carrier to discharge cargo, and then, when the discharged cargo was not immediately removed, say to the government, that, "we had an arrangement for transhipping the cargo, but such arrangement has fallen through."

The government regulation, as shown by the above evidence, required that "definite arrangements" must be made, and carriers must be in readiness the moment cargo was unloaded so as to immediately tranship the same.

The National Carbon Company admits that it had no "definite arrangement."

If the Oregon California Shipping Company had actually conformed to the alleged demand of the National Carbon Company for a delivery of its cargo at the Port of Colon, the government of the United States would have immediately intervened and prohibited the carrier from making such a discharge of cargo, unless it could show that definite arrangements for its transhipment had been made.

The record in this case discloses by the above evidence, that no definite arrangement for the transhipment of this cargo had been made.

This is not a strained or technical construction of this evidence, but a straightforward statement of the facts disclosed by the record.

Suppose the Oregon California Shipping Company had conformed to the alleged demand of the National Carbon Company for a delivery of its cargo, and when the government asked it what arrangements it had made for transhipment, it had given in reply the very answer of Mr. Mitchell as above set forth, would the government have accepted such an answer as a satisfactory compliance with its order that definite arrangements must have been made, and carriers ready to take the cargo when unloaded?

While the answer to this question is obvious, we respectfully urge the court not to overlook the importance of the situation.

We respectfully contend, that when this evidence is read in the light of all the circumstances, and the actual and unambiguous meaning of its words is considered, it clearly establishes, that the steamship "Eureka" would have been prohibited from delivering to the National Carbon Company its cargo,

because no definite arrangements had been made for its transhipment.

This record positively shows that, a carrier was prohibited from discharging any portion of its cargo at the Port of Colon, **"unless the parties so unloading had definite arrangements made and carriers ready to take the cargoes when so unloaded."**

This same record likewise shows that the National Carbon Company did not have any definite arrangements for the transhipment of the cargo, and relied solely on hearsay information as to the possibility of transhipment.

This same record likewise shows that this indefinite hearsay information as to the probability of a chance to reship, constituted "all of the arrangements that the National Carbon Company had made at any time during the time that the "Eureka" was detained at Colon."

We respectfully contend that this is not an abstract or technical argument, but that the claim of the steamship "Eureka" in this particular is as just and equitable as any claim could possibly be.

If the National Carbon Company now seeks to establish a legal liability against the Steamship "Eureka," and to recover damages for injury to its

cargo arising out of the extraordinary occurrences which gave rise to this litigation, and seeks to base its claim upon the sole ground that it made a demand for a delivery of its cargo at the Port of Colon, it should certainly be compelled, as a matter of justice and right, to show that the Steamship "Eureka" could have conformed to such demand.

On the contrary, the very record which the National Carbon Company has presented to this court in support of its claim, establishes positively, that the steamship could not have conformed to the demand, because the National Carbon Company itself had not made any definite arrangements for the transhipment of the cargo.

The Act of Congress of February 13th, 1893, commonly known as "The Harter Act," expressly exempts a ship where the loss is attributable, directly or indirectly, to any act or omission of the shipper or owner of the goods.

The exact language of the act is as follows:—

"* * * Or for loss resulting from any act or omission of the

shipper or owner of the goods, his agent or representatives."

27 Stat. L. 445.

The appellant's own record positively shows that it omitted to make definite arrangements for the transhipment of its cargo before making its demand upon the Steamship "Eureka."

The same record likewise shows that such a definite arrangement was required by the United States Government, as a condition precedent to the right to discharge any cargo at the Port of Colon.

The opinion rendered by this court recognizes that the mere making of a naked demand for delivery at Colon would not be sufficient to impose a liability upon the steamship, and, therefore, suggests that there were other ships plying between Colon and New York, and that if the goods had been placed upon such ships, the damage in question would have been avoided.

This very opinion recognizes, in other words, that the National Carbon Company must not only show that it made a demand, but must, likewise,

show that such demand could have been complied with, and concludes that this requirement is satisfied by the inference that there were other ships plying between Colon and New York.

The government requirement, however, as shown by the above evidence, made it necessary for the shipper to establish, as a condition precedent to the right of discharging cargo, not merely that there were other ships plying between Colon and New York, but that there was a certain, specific, and definite vessel, at Colon, upon which vessel the goods could have been transhipped immediately after unloading.

The shipper must show, in other words, that the loss or damage to the goods was directly caused by the failure to conform to the demand, and that such loss or damage was not in any way attributable to any omission upon the part of the shipper.

We respectfully contend, that the appellant's own record shows, that the shipper omitted to make any definite arrangements for the transhipment of its cargo, as required by the government regulations, and thereby made conformity to its demand impossible, or has at least shown to this court that it was impossible.

We are not seeking for a strained construction

of such testimony, or asking this court to make an inference from such testimony, but we are asking the court to consider the facts as they have been positively proved by the appellant, and to withdraw from its opinion the following statement:—

> "We think it evident, that if the goods had been delivered in Colon at that time, the damage would have been obviated, for there were a number of ships plying between Colon and New York upon some of which room could have been obtained."

If the above finding is withdrawn from the decision rendered in this case, there is no fact left upon which to base a legal liability against the steamship " Eureka."

The legal liability established by the decision rendered in this case, rests solely upon the alleged refusal of the owner to comply with the demand for delivery at Colon.

It is true that in the latter part of its decision,

this court concluded, "that if the ship had sailed from Colon about October 11th, when transhipment was advised by the master of the ship, the damage would have been avoided," but this language is so clearly opposed to the statement contained in the preceding paragraph, to the effect that, "libelant bases its action for damages not upon delay," that we may treat the latter language as dictum.

In view of the undisputed fact that the Government of the United States would not allow a discharge of cargo at the Port of Colon in the absence of an absolute guarantee of transhipment, and in view of the further undisputed fact that all efforts at transhipment were rendered futile by the absence of carriers, is it logical, equitable, or justifiable, to hold the steamship legally liable for failure to conform to an alleged demand, with which it was impossible to comply?

We venture the assertion, that in all the history of admiralty jurisprudence no case can be found in support of a theory, which has held a ship liable for failure to perform an act, the performance of which was prevented by governmental authority.

The case of "The Conventina," 52 Fed. 156, which was cited by this court in support of the liability which its opinion has imposed upon the

steamship "Eureka," is in no manner supportive of the rule laid down in the present case.

The case of "The Conventina," 52 Fed. 156 was a case wherein the vessel had been chartered by the owners.

After the cargo was shipped, a controversy arose between the owners and the charterers as to whether the ship was bound to touch at certain ports in Spain.

The charterers caused the vessel to be attached on a claim of damages for breach of charter, and she remained in custody forty days, until a reversal on appeal.

The owners were unable at first to procure the release of the ship.

After a period of forty days, a decree was entered by the appellant court in favor of the owners.

When the shipper libeled the ship for damages on account of delay, an attempt was made to excuse the delay of the ship under the exceptions contained in the bill of lading.

The court held that the detention by attachment did not come within the meaning of the ex-expression, "Restraint of Princes," etc.

The same court finally held that the shipper was a stranger to the controversy between the owners and charterers, and that the shipper could not be held accountable for the act of the owners in chartering the boat under the terms of a contract which made possible the controversy between the owners and the charterers, and that the shipper could not be held responsible for the act of the charterers in attaching the ship, which controversy arose out of the contract that had been made between the owners and the charterers.

The court further suggested, that when the controversy arose between the owners and the charterers, the owners might have reshipped the goods by another vessel.

We respectfully suggest that there is not a single point of analogy between the facts presented in the case of "The Conventina" and the facts presented in the case at bar.

Can it be said that the Oregon California Shipping Company was responsible for, or made possible, the slides in the Panama Canal?

Can it be contended that the owners of the steamship "Eureka" made possible the slides in the Panama Canal?

Can it be held that L. Rubelli's Sons made possible the slides in the Panama Canal?

Can it be contended that the master of the steamship "Eureka" made possible the slides in the Panama Canal?

These questions, of course, answer themselves, and it cannot even be contended, that the National Carbon Company was responsible for the slides in the Panama Canal.

It was to meet just such a condition that the bills of lading, issued for the cargo in the present controversy, contained provisions eliminating liability in event of an unforseen impediment to the voyage.

Is it fair or reasonable to hold, that all of the provisions of these bills of lading, which constitutes the solemn contract between the National Carbon Company and the steamship "Eureka," could be abrogated by the action of the national Carbon Company, in making a demand upon the steamship "Eureka" for a delivery of its cargo at the Port of Colon, in an instance where the detention of the ship at the Port of Colon was caused by an Act of God, over which none of the parties had any control, and in an instance where the ship itself was

prevented by governmental authority from discharging the cargo at the Port of Colon?

The only language found in the case of "The Conventina," which in any way bears upon the present controversy, is the statement, that in view of the uncertain litigation existing between the owner and the charterer and which both had made possible, a reasonable consideration of the shipper's interests required a transhipment of the goods by another vessel, or a notification to the shipper of the probable delay, and the privilege given such shipper to reship them.

This statement of an abstract rule of law by District Judge Brown, presupposes the possibility of transhipment, and was applied in a case where the delay of the ship was directly caused by the action of the owner and the charterer.

Can the application of such a rule of law, to such a state of facts, be adopted as a basis for establishing liability in the case at bar, where the admitted facts, proven by the shipper itself, show that the carrier made every possible effort to tranship the goods and was unable to accomplish such transhipment, and was furthermore prevented by the government from discharging its cargo in the absence of a guarantee of transhipment?

The case of "The Martha," 35 Fed. 313, has already been analyzed in the appellee's brief, in connection with the presentation of its case on appeal, and, as pointed out in such brief, the period of delay in the case of "The Martha" was absolutely fixed, by virtue of the fact that it took three months to procure the parts, necessary to enable "The Martha" to continue her voyage.

In the case of "The Martha," however, there was not a scintilla of evidence to show that a premature discharge of her cargo was rendered impossible by an Act of the Government or any other agency.

In that case, Judge Benedict directly held that the shipowner had offered no reasonable excuse of any kind for refusing a premature delivery of the cargo.

In the case at bar, the period of delay was a matter of continuing uncertainty, and the carrier has shown, as an excuse, for the non-delivery of the cargo at Colon, that the Government of the United States would not permit its discharge, in the absence of a guarantee of transhipment, which transhipment was impossible.

We, therefore, respectfully contend that neither the case of "The Conventina" nor the case of "The

Martha" is an authority in support of the appellant's position in the present controversy.

It has long been an establilshed rule of law that a carrier could by its bill of lading exempt itself from liability on account of damages arising from an Act of God.

The bills of lading, covering the shipments in controversy, contained the usual and stereotyped provisions in this particular, and further exempted the carrier from liability on account of all unforseen obstructions to the progress of the voyage.

Supplementing and confirming this long established rule of law, the Congress of the United States has adopted an Act which expressly relieves a shipper from responsibility for damage arising on account of an Act of God.

The language of this enactment is as follows:

> "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects sea-

worthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from the dangers of the sea or other navigable waters, acts of God, * * * * etc."

27 Stat. L. 445.

The above statute was by operation of law incorporated into the bills of lading covering the shipments in controversy.

It must certainly be admitted that the slides in the Panama Canal were "dangers of navigable waters", and "acts of God."

The rule contended for by the appellant in this case and adopted by this court, amounts to a hold-

ing that the effect of the above statute and the protection which such statute gives to a carrier, may be abrogated by the action of a shipper in demanding a premature delivery of his cargo whenever "a danger of navigable waters" or "an act of God" prevents the completion of the voyage.

It, likewise, premits a shipper to abrogate all the provisions of a bill of lading which protect the carrier from responsibility for unforseen difficulties.

The record in this case conclusively establishes the absence of any means for transhipping the cargo from Colon while the ship was there delayed.

The record in this case conclusively establishes that the Government of the United States would not allow the carrier to discharge any cargo at the Port of Colon, unless it would guarantee an immediate transhipment of such cargo.

The record in this case conclusively establishes that the slides in the Panama Canal prevented the steamship "Eureka" from continuing her voyage.

The record in this case conclusively establishes that the shipments in controversy were to be taken by the way of the Panama Canal only.

The statutes of the United States, which con-

stituted an element of the contract of affreightment between the parties in this controversy, expressly relieved the carrier from responsibility for damage occasioned by "dangers of the sea, or other navigable waters," or "acts of God."

Can it be that a shipper may go roughshod over such a statute and abrogate its effect, by making a demand for a premature delivery of its cargo in an instance where the carrier is unable to conform to such demand?

The reasonableness of the governmental order prohibiting the discharge of any cargo at the Port of Colon in the absence of a guarantee of immediate transhipment, can hardly be questioned.

If, fifty ships had been detained at the Atlantic entrance to the Panama Canal, on account of slides therein, and each of the shippers having cargo on the fifty ships had demanded a premature delivery of their cargo at Colon, what would have been the result?

If, each of the shippers having cargo on the steamship "Eureka" had demanded a delivery of their particular portions at the Port of Colon, what would have been the result?

There can be but one answer to these questions.

Is it, therefore, proper to enforce a liability in favor of one shipper which could not, under the circumstances, have been enforced in favor of every shipper?

We respectfully suggest that when the rule announced in the present case is viewed from the standpoint of the "Harter Act," and from the viewpoint of its general effect upon carriers, and from the viewpoint of its effect upon the rights of all other shippers, its own injustice and incorrectness is self-apparent and that a rehearing should be granted in this controversy.

Respectfully submitted,

PLATT & PLATT and

HUGH MONTGOMERY,

Proctors for Appellee.